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SURVEY OF LIABILITY REGIMES RELEVANT TO THE TOPIC OF INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

Prepared by the Secretariat

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ABBREVIATIONS

CERCLA	Comprehensive Environmental Response, Compensation and Liability Act (USA)
CIV	International Convention Concerning the Carriage of Passengers and Luggage by Rail
CRTD	Convention on Civil Liability and for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels
CWA	Clean Water Act (USA)
ELA	Environmental Liability Act (Germany)
FWPCA	Federal Water Pollution Control Act (USA)
HNS	Draft International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea
HSWA	Hazardous and Solid Waste Amendment (USA)
OECD	Organization for Economic Cooperation and Development
OPA	Oil Pollution Act (USA)
RCRA	The Solid Waste Disposal Act (also called the Resource Conservation and Recovery Act) (USA)
SARA	Superfund Amendments and Reauthorization Act (USA)

SURVEY OF LIABILITY REGIMES RELEVANT TO THE TOPIC OF INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

INTRODUCTION

1. In paragraph 5 of its resolution 49/51 of 9 December 1994, the General Assembly requested the Secretariat to update a study published in 1984 under the title "Survey of State practice relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law". 1/ The present Study has been prepared in response to that request.

2. Bearing in mind that the International Law Commission has already adopted on first reading a set of articles on prevention issues, the Secretariat has, in accordance with the Special Rapporteur's wish, focused the Study on liability aspects of the topic.

3. The Study reviews existing international conventions, international case law, other forms of State practice as well as available domestic legislation and domestic courts' decisions bearing on the issue of liability. For the sake of comprehensiveness, it incorporates the materials on liability included in the 1984 Survey.

4. The inclusion of materials on specific activities is without prejudice to the question whether such activities are "prohibited by international law" or not. It is useful to consider the handling of some disputes in which there was no general agreement as to the lawfulness or unlawfulness of the activities giving rise to injurious consequences.

5. The Study also includes, in addition to treaties, judicial decisions and arbitral awards and documents exchanged between foreign ministries and government officials. These documents are important sources of State practice. So are settlements through non-judicial methods which, although they are not products of conventional judicial procedure, may represent a pattern in trends regarding substantive issues in dispute. Statements made by the State officials involved as well as the content of actual settlements will be examined for their possible relevance to the substantive principles of liability.

6. The Study has not ignored the difficulties of evaluating a particular instance as "evidence" of State practice. 2/ Different policies may motivate

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1/ Yearbook of International Law Commission 1985, vol. II (Part One) (Addendum), document A/CN.4/384.

2/ For example, abstention by States from engaging in activities which, although lawful, may cause injuries beyond their territorial jurisdiction, may or may not be relevant to creating customary behaviour. The Permanent Court of International Justice and its successor, the International Court of Justice, have observed that the mere fact of abstention without careful consideration of the motivating factors, is insufficient proof of the

the conclusion of treaties or decisions. Some may be compromises or accommodations for extraneous reasons. But repeated instances of State practice, when they follow and promote similar policies, may create expectations about the authoritativeness of those policies in future behaviour. Even though some of the policies may not have been explicitly stated in connection with the relevant events, or may purposely and explicitly have been left undecided, continuous similar behaviour may lead to the creation of a customary norm. Whether or not the materials examined here are established as customary law, they demonstrate a trend in expectations and may contribute to the clarification of policies concerning some detailed principles of liability relevant to the topic. Practice also demonstrates ways in which competing principles, such as "State sovereignty" and "domestic jurisdiction", are to be reconciled with the new norms.

7. In referring to State practice, caution must be exercised in extrapolating principles, for the more general expectations about the degree of tolerance concerning the injurious impact of activities can vary from activity to activity.

8. The materials examined in the Study are not, of course, exhaustive. They relate primarily to activities concerning the physical use and management of

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existence of an international legal custom. Abstention by States from acting in a certain way may have a number of reasons, not all of which have legal significance. See the judgement rendered on 7 September 1927 by the Permanent Court of International Justice in the Lotus case (P.C.I.J. Series A, No. 10, p. 28). A similar point was made by the International Court of Justice in its judgment of 20 November in the Asylum case (I.C.J. Reports 1950, p. 286), and in its judgment of 20 February 1969 relating to the North Sea Continental Shelf cases (I.C.J. Reports 1969, p. 44, para. 77). See also C. Parry, The Sources and Evidences of International Law, 1965, pp. 34-64.

However, in its judgment of 6 April 1955 in the Nottebohm case (second phase), the Court relied on State restraint as evidence of the existence of an international norm restricting freedom of action (I.C.J. Reports 1955, pp. 21-22).

On the importance of norm generating properties of "incidents" Michael Reisman observes that:

> "The normative expectations that political analysts infer from events are the substance of much of contemporary international law. The fact that the people who are inferring norms from incidents do not refer to the product of their inquiry as 'international law' in no way affects the validity of their enterprise, any more than the obliviousness of Molière's M. Jourdain to the fact that he was speaking prose meant that he was not. Whatever it is called, law it is."

See W. Michael Reisman, "International Incidents: Introduction to a New Genre in the Study of International Law", in International Incidents: The Law that Counts in World Politics, W. Michael Reisman and Andrew R. Willard (editors), (Princeton Univ. Press), 1988, p. 5.

the environment, for State practice in regulating activities causing injuries beyond the territorial jurisdiction or control has been developed more extensively in this area. The Study is also designed to be a useful source material; hence, relevant extracts from domestic legislation, treaties, judicial decisions and official correspondence are also cited. The outline of the Study has been formulated on the basis of functional problems which may appear relevant to liability issues of the topic.

9. Chapter I describes the general characteristics of liability regimes such as the issue of causality. It reviews the historical development of the concept of strict liability in domestic law and provides an overview of the development of this concept in international law.

10. Chapter II examines the issue of the party that is liable. It describes the polluter-pays principle, operator liability and instances where States are considered liable.

11. Chapter III attempts to identify instances and conditions in which operator or State may be considered exonerated from liability.

12. Chapter IV examines the issues relevant to compensation. Such issues include the content of compensation; namely compensable injuries, forms of compensation and limitation on compensation. This chapter also examines the authorities recognized in State practice as competent to decide on compensation.

13. Chapter V describes statute of limitations provided mostly in treaties.

14. Chapter VI reviews the requirements of insurance and other anticipatory financial schemes to guarantee compensation in case of injury.

15. Finally, chapter VII examines the issue of enforcement of judgements granted mostly by domestic courts, in respect to compensation to injured parties.

CHAPTER I. GENERAL CHARACTERISTICS OF LIABILITY REGIMES

A. THE ISSUE OF CAUSALITY

16. The concept of liability was developed in domestic law in connection with tortious acts. The evolution of the notion in domestic law reveals its policy considerations, many of which have shaped the present theory of liability and particularly the place of "fault" in accountability and payment of compensation in relation to certain activities. In order to understand fully the development of the concept of liability and to foresee its future configuration in international law, it is useful to review briefly the historical development of this concept in domestic law.

17. This is not to suggest that the development of the liability concept in international law will or should have the same content and procedures as in domestic law. The concept of liability is much more developed in domestic law and its introduction to international law cannot ignore the experience gained in this area in domestic law. The domestic law references to liability are mentioned only to provide guidelines when appropriate for understanding the concept of liability and its development.

18. Historically, one of the main concerns and most important elements in the evolution of the law of liability was the maintenance of public order by preventing individual vengeance. Under primitive law causation was sufficient to establish liability. Primitive law did not look so much to "the intent of the actor as [it did to] the loss and the damage of the party suffering". 3/ Two reasons have been advanced for this approach of primitive law. First the inability or unwillingness to assume that harm could occur unintentionally. 4/ Second early common law was based on the principle that individual human beings act at their own risk and therefore are responsible for the consequence of their actions. 5/ Liability in early law, if not "absolute" was none the less "strict" and "little regard was paid to the moral quality of the person whose conduct caused the injury". 6/ Gradually, the law began to pay more attention to exculpatory considerations and partially "under the influence of the moral philosophy of the Church, tended to progress in the direction of recognizing moral culpability as the proper basis of

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3/ Lambert v. Bessey (1681) T. Raym. 421, 422 cited in John G. Fleming, The law of Torts, (5th ed.) 1977, p. 7 (thereafter cited as Fleming).

4/ See Ehrenzweig "A Psychoanalysis of Negligence", NW.U.L.Rev., vol. 47, 1953, p. 855, cited in ibid.

5/ See Winfield, "The Myth of Absolute Liability", L.Q.R., vol. 42, p. 37 (1926), cited in ibid.

6/ See Fleming, p. 7.

tort". 7/ This approach which tended to benefit the party causing injury rather than the injured accelerated in the nineteenth century as the result of Industrial Revolution:

> "During the nineteenth century, the 'moral advance' of tort law vastly accelerated. In response to doctrines of natural law and laissez faire, the courts attached increasing importance to freedom of action and ultimately yielded to the general dogma of 'no liability without fault'. This movement coincided with, and was undoubtedly influenced by the demands of the Industrial Revolution. It was felt to be in the better interest of an advancing economy to subordinate the security of individuals, who happened to become casualties of the new machine age, rather than fetter enterprise by loading it with cost of 'inevitable' accidents. Liability for faultless causation was feared to impede progress because it gave the individual no opportunity for avoiding liability by being careful and thus confronted him with the dilemma of either giving up his projected activity or shouldering the cost of any resulting injury. Fault alone was deemed to justify a shifting of loss, because the function of tort remedies was seen as primarily admonitory or deterrent." 8/

19. This approach has been revised. Indeed, the views in the area of accidents have been changing drastically:

> "It is being increasingly realized that human failures in a machine age exact a large and fairly regular toll of life, limb and property, which is not significantly reducible by standards of conduct that can be prescribed and enforced through the operation of tort law. Accident prevention is more effectively promoted through the pressure exerted by penal sanctions attached to safety regulations and such extra-legal measures as road safety campaigns, the practice of insurance companies to base the rate of premiums on the insured's accident rate, improvements in the quality of roads and motor vehicles and the production processes in industry. But despite all these controls, accidents and injuries remain, and it is the task of the modern law of torts to deal with them. ... The question is simply, who is to pay for their cost [industrial progress], the hapless victim who may be unable to pin conventional fault on any particular individual, or those who benefit from accident-producing activity? The effect of denying compensation to the casualty is 'to take much from few, and something from all, in order that a special group may pay less'." 9/

20. Recognizing the fact that in modern life conditions, many activities may have a high toll on life and limb and property, policy makers have had to make a decision; either (1) enjoin the conduct of certain activities; (2) let the

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7/ Ibid., pp. 7-8.

8/ Ibid., p. 8.

9/ Ibid., pp. 8-9. Emphasis added.

costs fall where the injury falls; (3) prescribe that certain activities can only be conducted under certain predetermined safety measures, or (4) tolerate the activity on condition that it pays its way regardless of the manner in which it was conducted. The first alternative was found impractical and incompatible with free democratic society and its economic and industrial policies. The second alternative was considered incompatible with the principle of equity and social justice system. 10/

21. The third alternative was problematic because it would lead to the application of fault or negligence liability to all activities. While those principles could be made applicable to many activities, they could not be prescribed in respect of every activity. Such a solution would have led to proliferation of safety statutes and rules and licensing systems, and would have placed substantial pressure and costs on the State's police, administrative and enforcement agencies. It would also have overburdened the courts with complicated litigations and force the courts to determine whether or not there was fault or negligence in respect of highly technical and complex activities. This alternative would inevitably operate in favour of the person conducting the activity which caused the injury, for the injured party has the burden of proof. 11/

22. The fourth alternative led to the creation of the concept of strict liability. The person whose activity causes the injury is held liable "not for any 'particular' fault occurring in the course of the operation, but for the inevitable consequences of a dangerous activity which could be stigmatized as negligent on account of its foreseeable harmful potentialities, were it not for the fact that its generally beneficial character requires us to tolerate it in the interest of the community at large." 12/

B. STRICT LIABILITY

1. Domestic Law

23. Many legal systems have shown a persistent tendency to recognize the concept of strict liability while maintaining liability dependent on "fault" as the general principle. 13/ The civil codes (CC) of many States, including those of France, Belgium and Italy, impose strict liability upon the owner or keeper of an animal for the damage it causes, whether the animal

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10/ Fleming, op. cit., pp. 315-316.

11/ Ibid.

12/ Ibid.

13/ This concept in respect of damage caused by animals was recognized in Roman law. Under the actio de pauperis derived from the XII Tables, an owner was required either to compensate the victim for his loss or to make surrender of the offending animal. See, F.F. Stone, "Liability for damage caused by things", in A. Tunc, ed., International Encyclopedia of Comparative Law, vol. XI, Torts, part 1 (Nijhoff, The Hague, 1983), chap. 5, p. 11, para. 39.

was in his keeping or had strayed or escaped. 14/ The German Civil Code of 1900, as amended in 1908, provides for exceptions to strict liability only in the case of domestic animals used by the owner in his profession or in his business, or under his care. 15/

24. Strict liability is also recognized in respect of owners or keepers of animals in Argentina (CC, art. 1126), Brazil (CC, art. 1527), Colombia (CC, art. 2353), Greece (CC, art. 924), Hungary (CC, art. 353), Mexico (CC, art. 1930), the Netherlands (CC, art. 1404), Poland (CC, art. 431), and Switzerland (CC, art. 56). 16/

25. Strict liability for damage caused by fire is widely recognized in domestic law and the elements of fault or negligence are still essential for liability. For example, the French Civil Code, in article 1384, holds a person who possesses by whatever right all or part of a building or personal property in which a fire occurs liable vis-à-vis third persons for damage caused by such fire only if it is proved that it was attributable to his fault or to the fault of a person for whom he is responsible.

26. In domestic law, strict liability in the case of abnormally dangerous activities and objects is a comparatively new concept. The leading decision which has influenced domestic law in the United Kingdom and the United States, and which is thought to have given rise to the doctrine of strict liability in common law, is that rendered in the United Kingdom in 1868 in the Rylands v. Fletcher case. 17/ Justice Blackburn, in the Exchequer Chamber, had stated:

> "We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape ..." 18/

27. This broad language was later limited by the House of Lords, which stated that the principle applied only to a "non-natural" use of the defendant's lands, as distinguished from "any purpose for which it might in the ordinary

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14/ Ibid., p. 12, para. 42.

15/ Article 833 of the German Civil Code, ibid., p. 13, para. 47.

16/ Ibid., p. 14, paras. 51-52.

17/ The Law Reports, Court of Exchequer, vol. I, 1866, p. 265, affd. in ibid., House of Lords, vol. 3, 1868, p. 330. In regard to the implication to the United States law, see Prosser and Keeton, Torts, 5th ed. 1984, pp. 545-559. See also Anderson, "The Rylands v. Fletcher doctrine in America: abnormally dangerous, ultrahazardous, or absolute nuisance?" Arizona State Law Journal, Tempe, 1978, p. 99.

18/ Ibid., p. 279.

course of the enjoyment of land be used". 19/ More than 100 subsequent decisions in the United Kingdom have followed the ruling in this case, and strict liability has been confined to things or activities that are "extraordinary", "exceptional" or "abnormal", to the exclusion of those that are "usual and normal". 20/ This doctrine does not appear to be applicable to ordinary use of land or to such use as is proper for the benefit of the general community. 21/ In determining what is a "non-natural use", the English courts appear to have looked not only to the character of the thing or activity in question, but also to the place and manner in which it is maintained and its relation to its environment. 22/

28. In the United States, the Rylands v. Fletcher precedent was followed by a large number of courts, but rejected by others, among them the courts of New York, New Hampshire and New Jersey. Since the cases before the latter courts bore on customary, natural uses "to which the English courts would certainly never have applied the rule", it was held that the Rylands v. Fletcher rule had been "misstated" and, as such, must be "rejected in cases in which it had no proper application in the first place". 23/ The American Restatement of the Law of Torts, established by the American Law Institute, 24/ adopted the principle of the Rylands v. Fletcher decision, but confined its application to ultra-hazardous activities of the defendant. Section 520 enumerates factors to be considered in determining whether an activity is abnormally dangerous:

19/ The Law Reports, English and Irish Appeal Cases before the House of Lords, vol. III, 1868, pp. 330, at 338.

20/ Prosser, op. cit., p. 506, and footnotes 48, 50 and 51.

21/ The House of Lords halted the expansion of that doctrine in a case in which the plaintiff, a government inspector, had been injured by an explosion in the defendant's munitions plant. The judges in this case limited the principle of strict liability to cases in which there had been an escape of a dangerous substance from land under the control of the defendant, and two other judges held that the principle was not applicable to personal injury. This decision was a sudden departure from the holdings of the leading case; however, it is uncertain whether it has changed the trend towards the application of the principle of strict liability established by the decision in the Rylands v. Fletcher case (see Prosser, op. cit., p. 506, footnote 52).

22/ W.T.S. Stallybrass, "Dangerous things and the non-natural use of land", The Cambridge Law Journal, London, vol. III, 1929, p. 387. See also The Law Commission, Civil Liability for Dangerous Things and Activities (London, 1970).

23/ Prosser, Selected Topics on the Law of Torts (Ann Arbor, University of Michigan Law School, 1954), pp. 149-152.

24/ See American Law Institute, American Restatement of the Law of Torts (Washington, D.C., 1938), vol. III, chap. 21, sects. 529-524.

(a) Existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) Likelihood that the harm that results from it will be great;

(c) Impossibility of eliminating the risk by the exercise of reasonable care;

(d) Extent to which the activity is not one of common usage;

(e) Inappropriateness of the activity to the place where it is carried on;

(f) Extent to which its value to the community is outweighed by its dangerous attributes.

29. Ultra-hazardous activities have been defined as those that necessarily involve a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care and are not a matter of common usage. This definition has been criticized on the grounds that it is narrower than the ruling in the Rylands v. Fletcher case and for its emphasis on the nature of the activity - "extreme danger and impossibility of eliminating it with all possible care" - rather than on its relation to its surroundings. 25/ At the same time, the Restatement is broader than the ruling in the case, for it does not limit the concept to cases where the material "escapes" from the defendant's land.

30. In domestic law, there are at least two underlying reasons for adopting strict liability. First, the limited knowledge about the increasingly developing science and technology and their effects. 26/ Second, the difficulty in establishing which conduct is negligent and presenting evidence necessary to establish negligence. 27/

31. It has also been suggested that strict liability is another aspect of negligence and the basis of both concepts rests on responsibility for creating an abnormal risk. 28/ Negligence differs from strict liability to the extent it is primarily concerned with "an improper manner of doing things which are safe ... enough, when properly carried out", while strict liability deals with "activities which remain dangerous despite all reasonable

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25/ See William Prosser, Selected Topics on the Law of Torts, p. 158.

26/ Goldie elaborates on this issue by stating that in the present "state of the art" of new industries, no amount of foresight or feasible measures may avert injuries. See, Goldie, "International Liability for Damage and the Progressive Development of International Law", Int'l & Comp. L. Q., vol. 14, 1965, p. 1203.

27/ Goldie, ibid., p. 1203.

28/ William Prosser, Selected Topics on the Law of Torts, ch. 3, 1954.

precaution." 29/ It is suggested that the explanation for this view "lies in the dilemma that, if such an activity were branded as negligent on account of its irreducible risk, it would be tantamount to condemning it as unlawful." 30/ The core of strict liability is therefore to impose liability on lawful, not "reprehensible" 31/ activities which entail extraordinary risk of harm to others, either because of the seriousness or the frequency of the potential harm. 32/ The activity has been permitted on the condition 33/ and the understanding that the activity will absorb the cost of its potential accidents as part of its overhead. 34/ Apparently United States courts have endorsed the application of strict liability in relation to abnormal 35/ activities, and have not applied it in relation to relatively common activities on the assumption that "the risky activity is fairly common, the incident of harm and of responsibility are so evenly matched that nothing will be gained by imposing strict liability." 36/ This reasoning has been criticized by some authors on the grounds that:

> "Just as a major 'public benefit' flowing from a hazardous activity (like nuclear power stations and other public utilities) is no longer a good reason for leaving it unburdened but rather reinforces the wisdom of distributing the loss among its beneficiaries, so the very fact that it is widespread and exposes the community to a typical hazard may furnish a sufficient reason for tolerating it particularly germane to such common hazards as motoring and flying." 37/

32. The theory of strict liability has been incorporated in the Workmen's Compensation Acts in the United States; the employer is strictly liable for

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29/ Fleming, p. 316. The assumption is that negligence is negated if all reasonable precautions are taken. Ibid., note 11.

30/ Fleming, p. 316.

31/ This term is used by Fleming to distinguish between negligence and strict liability.

32/ Strahl, "Tort Liability and Insurance", Scand. Stud. L., vol. 3, pp. 213-218, 1959.

33/ See Keeton, "Conditional Fault in the Law of Torts", Harv. L. Rev. vol. 72, p. 401, 1958, cited in Fleming, p. 316, note 18.

34/ Fleming, p. 316.

35/ See Fleming, p. 316.

36/ Ibid.

37/ Fleming, p. 317. See also Goldie, "Liability for damage and the Progressive Development of International Law", Int'l and Comp. L. Q., vol. 14, p. 1207, 1965.

injuries to his employees. The policy behind liability for employers is one of "social insurance" and of determining who can best carry the loss. 38/ These laws do not cover all activities but in the last few years there has been strong advocacy in the United States for "strict liability" on a broader scale.

33. The strict liability of employers is also recognized in France. Under article 1 of the 1898 law concerning liability for industrial accidents to workers (concernant la responsabilité des accidents dont les ouvriers sont victimes dans leur travail), the victim or his representatives are entitled to demand compensation from the employer if, in consequence of the accident, the person concerned is obliged to stop work for more than four days.

34. The rule of strict liability for ultra-hazardous activities appears to be provided for in article 1384, paragraph 1, of the French Civil Code, 39/ which stipulates:

> "A person liable not only for the damage he causes by his own act, but also for that caused by the acts of persons for whom he is responsible or by things that he has under his charge."

35. Under the rules laid down by this article and first confirmed by the Cour de Cassation in June 1896, it suffices that the plaintiff show that he has suffered damage from an inanimate object in the defendant's keeping for liability to be established: 40/

> "... a literal interpretation of the article [1384] undoubtedly gives a result comparable to - or rather more far-reaching than - that in Rylands v. Fletcher, for there is nothing in the words of the article to restrict liability to cases where defendant can be

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38/ The concept of workmen's compensation derives from the duties under common law formerly incumbent upon the master for the protection of his servants. See Prosser, op. cit., pp. 525 et seq., see also p. 531, footnote 43.

39/ See H. and L. Mazeaud, Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle, vol. II, 5th ed. established by A. Tunc (Paris, Montchrestien, 1958), p. 342; A. von Mehren and J.R. Gordley, The civil Law System, 2nd ed. (Boston, Little, 1977), p. 555; F.H. Lawson, Negligence in the Civil Law (Oxford, Clarendon Press, 1950), pp. 46-50; Ro Dodière, "Responsabilité civile et risque atomique", Revue internationale de droit comparé, Paris, 11th year, 1959, p. 505; B. Starck, "The foundation of delictual liability in contemporary French law: An Evaluation and a proposal", Tulane Law Review, New Orleans, La., vol. 48, 1973-1974, pp. 1044-1049.

40/ See also Jand'heur v. Galeries beofortaises (1930) (Dalloz, Recueil périodique et critique, 1930 (Paris), part 1, p. 57). The decision in this case also established a presumption of fault on the part of the person having in his charge the inanimate object that has caused the injury.

proved to have been negligent in the custody of the things, or even to things which are inherently dangerous. ... ". 41/

36. Recognition of the principle of strict liability is also embodied in the 1964 Polish Civil Code, articles 435 to 437 of which recognize strict liability for damage caused by ultra-hazardous activities.

37. Article 178 of the Egyptian Civil Code, article 231 of the Iraqi Civil Code, article 291 of the Jordanian Civil Code and article 161 of the Sudanese Civil Code all establish the strict liability of persons in charge of machines or other objects requiring special care. Article 133 of the Algerian Civil Code goes even further and recognizes the strict liability of a person in charge of any object when that object causes damage. The Austrian Civil Code (art. 1318) and the 1928 Mexican Civil Code (arts. 1913 and 1932) also recognize strict liability in respect of dangerous activities or things.

38. The principle of strict liability has been applied in regard to defective products. The policies underlying this practice were stated in the United States in the Escola v. Coca Cola Bottling Co. case (1944):

"... Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection." 42/

39. This has become the authorative doctrine in some of the States of the United States. In others, for example, New York, it has been supported by additional reasons that were not applicable in the aforementioned case. In its modified form, strict liability in respect of defective products is based on the theory that the manufacturer was in breach of an implied warranty to

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41/ Lawson, op. cit., p. 44. For responsibility without fault in French law see also M. Ancel, "La Responsabilité sans faute en droit français", in Travaux de l'Association Henri Capitant II (1947), p. 249.

42/ California Reports 2d Series, vol. 24, p. 453, at p. 462.

the plaintiff that the article had been properly made. 43/ However, a leading United States specialist on the law of torts has strongly objected to this concept of "warranty" as a device that "carries far too much luggage in the way of undesirable complications, and is more trouble than it is worth". 44/

40. Since 1944, in France, the Conseil d'Etat has developed, in the French administrative law, a general principle of liability without fault based on the theory of risk. In addition the courts have been ready to presume fault on the part of the administration. Some consider, as an alternative, the basis for no fault liability to be found in the principle of "egalité devant les charges publiques". 45/ The principle here is that what is done in the general interest, even if is done lawfully, may give rise to compensation if it injures a particular person. 46/ The Conseil d'Etat has imposed risk theory in four categories of activities of the administration: (1) risks of assisting in the public service (similar to workmen's compensation), (2) risks arising from dangerous operations, where a public authority creates "an abnormal risk in the neighbourhood" (risque anormal du voisinage), (3) administrative refusal to execute a judicial decision, 47/ and (4) State liability arising out of legislation. 48/

43/ Goldberg v. Kollsman Instrument Corp. (1963), New York Supplement 2d Series, vol. 240, p. 592.

44/ Prosser, The Law of Torts, (op. cit., footnote 258 above), p. 656. See also R.M. Sachs, "Negligence or strict product liability: is there really a difference in law or economics?", Georgia Journal of International and Comparative Law, Athens, vol. 8, 1978, p. 259; and D.J. Gingerich, "The interagency task force 'blueprint' for reforming product liability tort law in the United States", ibid., p. 279.

45/ This principle was expressed by Duguit in his Traité de Droit Constitution (3rd ed., p. 469), cited in, L. Naville Brown, J.F. Garner and Jean-Michel Galabert, French Administrative Law, 1983, p. 121.

46/ Ibid.

47/ In a landmark case, (Couiteas, CE 30 November 1923), the Conseil d'Etat refused to decide whether the Government was at fault and instead invoked the principle of equality in bearing public burdens. Cited in ibid.

48/ See the case (Affaires Etrangère c. Consorts Burgat, CE 29 October 1976), where a landlord, because of the Government's enactment of diplomatic immunity which applied to her tenant and depriving her (the landlord) of exercising her normal rights as a landlord. Cited in ibid., pp. 121-125. See also, L. Naville Brown and John S. Bell, French Administrative Law, 4th ed. 1993, pp. 183-191, and F.H. Lawson, and B.S. Markesinis, Tortious Liability for Unintentional Harm in the Common Law and the Civil Law, vol. 1, 1982, pp. 146-176.

41. In the United States, the principle of strict liability is also apparent in the Aeronautics Act of 1922. 49/ That legislation, adopted in whole or in part by 24 States of the Union, provides for the "absolute liability" of the owners of aircraft for injuries to persons or property on land or water caused by the ascent, descent or flight of the aircraft or the dropping or falling of any object therefrom, unless the injury was caused in whole or in part by the negligence of the person injured, or of the owner or bailee of the property damaged. The object of the Act was to place the liability for damage caused by accidents of aircraft upon operators, and to protect innocent victims, even though the accident might not be attributable to the fault of the operator. 50/

42. A number of Latin American and European countries have also adopted the principle of strict liability, often similar to the 1933 and 1952 Rome Conventions for accidents involving aircraft. Argentina, Guatemala, Honduras and Mexico are among the Latin American countries which have imposed strict liability based on the concept of risk. Among European countries doing the same are Italy, Spain, Denmark, Sweden, Norway, Finland, Switzerland, France and Germany. 51/

43. The rule of strict liability has also been applied in respect of owners and operators of power sources for damage caused by the production or storage of electricity. In this area, the concept of strict liability corresponds to the notion that "electricity is a thing in one's keeping" (France, CC art. 1384), or to the notion that "the owner is presumed to be at fault" (Argentina, CC art. 1135), or to the notions of "dangerous things" (United States and United Kingdom), or of "dangerous activities" (Italy, CC art. 2050). 52/

44. Originally, nuisance meant nothing more than harm or annoyance. 53/ In common law, the principle of strict liability has been applied to cases of absolute nuisance, without regard to the defendant's intent or precautions.

49/ United States of America, Uniform Laws Annotated, vol. II, pp. 159-171. This act was withdrawn in 1938 by the National Conference of Commissioners on Uniform State Laws and replaced by other texts drafted by that body, imposing substantially the same limited absolute liability. See Handbook of National Conference of Commissioners on Uniform State Laws, 198, p. 318, and Uniform Aviation Liability Act, art. II, paras. 201-202.

50/ See E.C. Sweeney, "is special aviation liability legislation essential", The Journal of Air Law and Commerce, Chicago, Ill., vol. 19, p. 166; Prentiss et al. v. National Airlines, Inc., 112 federal Supplement, pp. 306 and 312.

51/ See Stone, One of Our H-Bombs is Missing, (New York, McGraw Hill, 1967), pp. 45-46, paras. 178-181.

52/ Ibid., pp. 48-49, paras. 193-197.

53/ Prosser, Selected Topics ... op. cit., p. 164.

There has been little discussion of nuisance in the context of liability. The reasons for this have been described as follows:

> "... One reason is that nuisance suits frequently have been in equity, seeking an injunction, so that the question is not so much one of the nature of the defendant's conduct as of whether he shall be permitted to continue it. Even where the action is one for damages, it usually has been brought after long continuance of the conduct and repeated requests to stop it, and whatever may have been his state of mind in the first instance, the defendant's persistence after notice of the harm he is doing takes on the aspects of an intentional tort. Another reason is that in nuisance cases the threat of future harm may in itself amount to a present interference with the public right or the use and enjoyment of land, so that the possible bases of liability tend to merge and become more or less indistinguishable. Nevertheless it is quite clear that a substantial part of the law of nuisance rests upon neither wrongful intent nor negligence. 54/

45. It has been claimed that the concept of absolute nuisance is closely related to the rule in Rylands v. Fletcher. To distinguish that rule, some have claimed that it applies to conduct which is not wrongful in itself, and so will not be prohibited or enjoined in advance, but will make the defendant strictly liable if it causes actual damage; in contrast a nuisance is in itself wrongful and may always be enjoined. Others have rejected this distinction on the grounds that there are no cases or decisions to sustain it. 55/ It has also been stated that the concept of absolute nuisance and the Rylands rule relate to one another like intersecting circles; they have a large area in common, but nuisance is the older tort and its historical development has limited it to two kinds of interference; with the public interest and with the enjoyment of land, excluding such other damage as personal injuries not connected with either. Thus the underlying principles appear to be the same in each case and are indistinguishable except by the accident of their history. 56/

46. In the United States, there has been an evolution in policies and the direction of statutes about dealing with environmental problems. The main policy in the 1970s was formed on the expectation that the Government would enact regulatory statutes and would police and enforce such statutes. The activities of those not complying with the regulations would be banned. It was believed that this policy of setting standards and enforcing it would force industry to correct itself. Subsequently, it was realized that, though threats of Government involvement were important incentives in forcing the

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54/ Ibid., p. 166. See also P.H. Winfield, "The myth of absolute liability", The Law Quarterly Review, London, vol. 42, 1926, p. 37.

55/ Prosser, Selected Topics ..., p. 172.

56/ Ibid., p. 177. See also Winfield, "Nuisance as a tort", The Cambridge Law Journal, London, vol. IV, 1932, p. 195.

industry to correct environmentally unsound activities, they were insufficient by themselves to change the industry's attitude. 57/ For one thing, environmental regulations are not comprehensive enough. The Government cannot identify all the environmental problems, develop regulations and provide "technologically workable and politically viable solutions". 58/ Secondly, even with the substantial size of United States Government enforcement agencies for environmental regulations, the Government cannot effectively monitor and enforce environmental regulations. 59/ Third, such a policy may not be economically most efficient or creative. Consequently attention was drawn towards enacting statutes which are so-to-speak self executing, creating incentives for private parties to play an important role in implementing environmental law. This policy led to enactment of a number of important federal statutes including the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) 60/, the Superfund Amendments and Reauthorization Act of 1986 (SARA) 61/, which amended CERCLA and created the Emergency Planning and Community Right-to-Know Act (EPCRA or SARA Title III) 62/, the Clean Water Act of 1987 (CWA) 63/ as amended by the Federal Water Pollution Control Act (FWPCA), 64/ and the

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57/ Many American scholars argued that the policy of regulatory mechanism as the main instrument in pollution control is misguided. See for example, Ackerman and Stewart, "Reforming Environmental Law", Stan. L. Rev., vol. 37, 1985, p. 1333; Breyer, "Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform", Harv. L. Rev., vol. 92, 1979, p. 547; and Hahn and Hester, "Marketable Permits: Lessons for Theory and Practice", Ecology L. Q., vol. 16, 1989, p. 361.

58/ Babich, "Understanding the New Era in Environmental Law", S. Calro. L. R., vol. 41, 1990, p. 736.

59/ Ibid., pp. 734 and 736.

60/ Pub. L. No. 97-510, 96th Cong., 2nd Sess. (11 December 1980), 94 Stat. 2767, 42 U.S.C.A. Section 9601 and et seq. For the history of the statute see, A.R. Light, CERCLA Law and Procedure, 1991; Grad, "A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980", Colum. J. Envi. Law, vol. 8, 1982, p. 1; and A.J. Topol and R. Snow, Superfund Law and Procedure, 1992.

61/ Pub. L. No. 99-499, 100 Stat. 1613.

62/ 42 U.S.C. Sections 11001-11050 (Supp. V 1987).

63/ 33 U.S.C.A., Sect. 1321.

64/ Adopted in 1972; Pub. L. No. 92-500, 86 Stat.816,33 U.S.C.A. Sections 1251-1376. This Act was supplemented in the form of the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566. The follow-up to the Act is called The Water Quality Act of 1987, Pub. L. No. 100-4, 100th Cong. 1st Sess., 101 Stat. 7, amending 33 U.S.C.A. Section 1251 et seq. This is known either as The Federal Water Pollution Act or as the Clean Water Act.

Oil Pollution Act of 1990 (OPA). 65/ The effect "of these new, liability-based statutes is to assign much of the responsibility for planning for a dangerous and uncertain environmental future to that segment of society most capable of finding innovative and efficient solutions: the private sector." 66/

47. These federal statutes have the following common characteristics, they:

(i) impose "strict" or "absolute" liability with only limited defence available on persons made legally responsible for pollution from oil and other hazardous substances 67/ for:

(a) removal and clean up costs, and

(b) damages for injury to or destruction of natural resources, private property, and other economic interests of governmental and private parties;

(ii) limit the maximum amount of liability of the responsible party and enumerate the circumstances where limitation of liability is not available;

(iii) impose a duty on those who may be held liable to prove financial responsibility such as insurance or other financial guarantees; and

(iv) establish various governmentally administered "Funds" to pay removal costs and damages when the party liable is not making payments. 68/

65/ Pub. L. No. 101-380, 104 Stat. 484 (Aug. 18, 1990), or 33 U.S.C.A. Sections 2701 et seq. For writings on that statute see, Randle, "The Oil Pollution Act of 1990: Its Provisions, Intent, and Effects", ELR, March 1991, p. 10119; Rodriguez and Jaffe, The Oil Pollution Act of 1990", Tul. Mar. L. J., vol. 15, 1990, p.1, and J. Strohmeyer, Extreme Conditions: Big Oil and the Transformation of Alaska, 1993.

66/ Babich, "Understanding the New Era in Environmental Law", S. Carol. L. R., vol. 41, 1990, p.735. Not all members of US Congress consider the new era of legislative trend a success. See "Domenici Declare Superfund 'Failure,' Suggest Revamped Liability Scheme", Inside E.P.A., vol. 10, Sep. 22, 1989, p. 4.

67/ For OPA see section 2710 (b); for CERCLA see Section 9707 (e)(i) and for FWPCA see Section 1321 (f).

68/ See Robert Force, "Insurance and Liability for Pollution in the United States", in Transnational Environmental Liability and Insurance, ed. by Ralph P. Kröner, 1993, p. 22. See also William H. Rodgers, Environmental Law, 1994, 2nd ed. p. 685.

48. In this latter regard section 2702 (a) of OPA provides:

> "Notwithstanding any other provision or rule of law, ... each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages as specified in subsection (b) that result from that incident." 69/

49. The Act defines "incident" as "any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil ..." 70/ The term "discharge" is defined as "any emission ... and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping". The term "facilities" is defined as any "structure or group of structures of equipment, or device which is used for one or more of the following purposes: transferring, processing, or transporting oil". The term "vessel" is defined broadly to include "every description of watercraft or other artificial contrivance used or capable of being used, as a means of transportation on water, other than a public vessel". And a "public vessel" is defined as a vessel owned or bareboat chartered and operated by the United States or by a foreign nation, except when the vessel is engaged in commerce.

50. CERCLA applies to all hazardous substances other than oil. The liability regime established under CERCLA is strict, joint and several. It applies to vessels and onshore and offshore facilities from which hazardous substances have been released. 71/ This scheme of liability is outlined in Section 107 of the Superfund Act and financial responsibility for clean-up is outlined in Section 108.

51. The Superfund provides compelling incentives for quick response to directives for removal or remedial action in Section 107 (c)(3) by imposing punitive damages. That Section reads:

> "If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 104 or 106 of this Act, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages,

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69/ 33 U.S.C.A.

70/ Section 2701(14) of the Act.

71/ 42 U.S.C.A. Section 9601(8).

which shall be in addition to any costs recovered from such person pursuant to section 112 (c) of the Act. Any money received by the United States pursuant to this subsection shall be deposited in the Fund." 72/

52. The Solid Waste Disposal Act (commonly known as the Resource Conservation and Recovery Act or RCRA) first enacted in 1965, has gone through a number of changes and amendments. The latest amendment was made in 1984 (Hazardous and Solid Waste Amendment HSWA) 73/ to respond to administrative lapses that had been experienced under its predecessors. 74/

53. The criterion in the Act is not "unreasonable risk" used in earlier environmental legislation, but to "[protect] human health and the environment" a standard which appears "on 50 occasions throughout the Act". 75/ The 1984 amendment also expanded the definition of solid waste, identified administrative standards as the minimum that can only be improved upon, and provided administrative reform within the United States Environmental Protection Agency by establishing an ombudsman. 76/ Section 6917 of the Amendment established an Office of Ombudsman to receive individual complaints, grievances, and requests for information submitted by any person with respect to any programme required under the relevant provisions of the Act. 77/

54. The United States Congress has been working on legislation on oil pollution since 1980. The Exxon Valdez spill 78/ in 1989 substantially affected the substance of the Oil Pollution Act of 1990. A significant portion of the Oil Pollution Act of 1990 is devoted to a liability regime roughly comparable to the one imposed on responsible parties who release hazardous substances under CERCLA. Subsection 1002 (a) introduces the general theory of liability of the Act:

72/ Superfund Act, pp. 2782-2783.

73/ Pub. L. 98-616, 98 Stat. 3221.

74/ Rodgers, p. 534.

75/ See Rodgers, p. 536.

76/ Rogers, p. 535.

77/ See 42 U.S.C.A. Section 6917, added in 1984.

78/ The Exxon Valdez has been referred to as "Pearl Harbour" of the United States environmental disaster. See Randle, "The Oil Pollution Act of 1990: Its Provisions, Intent, and Effects", E.L.R. vol. 21, p. 10119, March 1991; Rodriquez and Jaffe, "The Oil Pollution Act of 1990", Tul. Mar. L. J., vol. 15, p. 1, 1990.

> "Notwithstanding any other provision or rule of law, and subject to the provisions of this Act, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) that result from such incident."

55. In 1990, Germany adopted the Environmental Liability Act (ELA), providing a civil damages remedy for wrongful death, personal injury, or property damage caused by an environmental impact. 79/ Under ELA, operators of certain facilities identified in the Act are strictly liable for causing such injuries. The ELA increases the risk of liability for all enterprises capable of causing environmental injuries and has extraterritorial reach. 80/

56. The ELA is a synthesis of pre-existing civil damage remedies with a broader scope. Section 1 of the ELA defines its nature and scope:

> "If anyone suffers death, personal injury, or property damage due to an environmental impact emitted from one of the facilities named in Appendix 1, then the owner of the facility shall be liable to the injured person for the damages caused thereby." 81/

57. Liability is strict under the ELA and the proof of causation suffices to establish liability. If there are multiple defendants, their liability is joint and several. A claim under the ELA must establish: (a) that the defendant operates a facility named under the Act; (b) that events having an environmental impact were emitted from that facility; and (c) that environmental impact caused the injury for which a remedy is sought. 82/ The amount of liability under the Act is limited to a maximum of DM 320 million. 83/ Liability for personal injury and property damage are fixed at a maximum of DM 160 million each. 84/

79/ Gesetz über die Umwelthaftung, (Environmental Liability Act) enacted on 7 November 1990 and effective as of 1 January 1991. Cited in W. Hoffman, "Germany's New Environmental liability Act: Strict Liability for Facilities Causing Pollution", Netherlands International Law Review, vol. 38, 1991, p. 27. The information regarding the Germany's Act is based on this article.

80/ See M. Kloepfer, Umweltschutz, Textsammlung des Umweltrechts der Bundesrepublik Deutschland, 1989, cited in ibid., p. 28, note 2.

81/ Quoted in ibid., p. 32.

82/ Ibid. p. 33.

83/ See Section 15 of the Act.

84/ Ibid.

58. Proof of causation in respect of damage caused by long distance pollution is difficult under the ELA. To remedy this difficulty, the Act provides for presumption of causation. Section 6 (1) of the Act provides that the element of causation will be presumed upon a prima facie showing that the particular facility is "inherently suited" (geeignet) to cause the damage. 85/ The Act provides defences to the presumption of causation in subsections 2, 3 and 4 of Section 6. The defences include a showing by the operator that its facility was "properly operated", meaning that all applicable administrative regulatory instructions aiming at preventing pollution were complied with. Such defences do not absolve the operator of liability if the claimant proves causation.

59. The ELA amended the German Civil Procedure to allow actions to be brought in the court district where the facility causing alleged injury is located unless the facility is located beyond the German territorial border. In the latter situation, the claimant can sue in any German court and have the ELA apply to the substance of the complaint. 86/

60. The above brief review of domestic law indicates that strict liability, as a legal concept, now appears to have been accepted by most legal systems, especially those of technologically developed countries with more complex torts laws. The extent of activities subject to strict liability may differ; in some countries it is more limited than in others. The legal basis for strict liability also varies from "presumed fault" to the notion of "risk", "dangerous activity involved", etc. But it is evident that strict liability is a principle common to a sizeable number of countries with different legal systems, which have had the common experience of having to regulate activities to which this principle is relevant. While States may differ as to the particular application of this principle, their understanding and formulation of it are substantially similar.

2. International law

61. The introduction and application of the concept of liability in international law, on the other hand, is relatively new and less developed than in domestic law. One reason for this late start may have been the fact that the types of activities leading to transboundary harm are relatively new.

85/ Ibid. Section 6 (1) of ELA reads:

> "If a facility is inherently suited under the circumstances to cause the resulting damage, then it shall be presumed that this facility caused the damage. Inherently suitedness in a particular case is determined on the basis of the course of business, the structures used, the nature and concentration of the materials used and released, the weather conditions, the time and place of the commencement of the damage, as well as all other conditions which speak for or against a finding of causation."
>
> Quoted in ibid. p. 35, note 43.

86/ See art. 2 of ELA. See ibid, p. 38.

The issue did not arise with sufficient frequency to excite concern at the international level. Not many activities conducted within a State had important transboundary injurious effects. Of course, the difficulties in accommodating the concept of liability with other well-established concepts of international law, such as domestic jurisdiction and territorial sovereignty, should also not be ignored. In fact, the development of strict liability in domestic law, as explained earlier, faced similar difficulties. But socio-economic and political necessity in many States led to accommodating this new legal concept with others in ways deemed to serve social policies and public order.

62. Before reviewing multilateral treaties, mention should be made of Principle 22 of the Stockholm Declaration of 1972, 87/ and Principle 13 of the Rio Declaration of 1992 88/ in which States are encouraged to cooperate in developing further international law regarding liability and compensation for adverse effects of environmental damage caused by activities with their jurisdiction or control to areas beyond their jurisdiction. These Principles while lacking legal commitment by States, demonstrate aspirations and preferences of the international community.

(a) Treaty practice

63. Multilateral treaty practice touching on the issue of liability may be divided into three categories. First, civil liability conventions addressing the question of liability of operators and in some circumstances of States, in terms of both substantive and procedural rules. Second, treaties which hold the State directly liable. Third, treaties which make a general reference to liability without specifying any further the substantive or procedural rules related thereto.

64. The first category of multilateral treaties on liability addressing the question of civil liability are primarily concerned with navigation, oil and nuclear material. One of the very first conventions addressing civil liability issue in the area of navigation is the International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Seagoing Vessels of 25 August 1924. 89/ By this instrument the contracting States recognized the utility of laying down certain uniform rules relating to the limitation of the liability of owners of seagoing vessels. In accordance with article 1 of the treaty, the liability of the owner of the vessel is limited to an amount equal to the value of the vessel, the freight, and the accessories of the vessel, in respect of:

> "1. Compensation due to third parties by reason of damage caused, whether on land or on water, by the acts or faults of the

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87/ A/Conf.48/14/Rev.1.

88/ A/Conf.151/26/Rev.1 (Vol. 1), Annex I.

89/ League of Nations Treaty Series, No. 2763, vol. CXX, p. 125.

master, crew, pilot, or any other person in the service of the vessel;

...

3. Compensation due by reason of a fault of navigation committed in the execution of a contract;". 90/

65. In accordance with article 2 of the treaty, the limitation of liability in article 1 does not apply:

"1. To obligations arising out of acts of the owner of the vessel; ...". 91/

66. The treaty seems to have introduced concepts of "fault" and of "strict liability". Both concepts appear in article 1 of the treaty, which provides that the limitation of the owner of a seagoing vessel applies inter alia to acts or faults of the master, crew, pilot, or any other person in the service of the vessel and also to compensation due for fault of navigation committed in the execution of the contract. The limitation of liability, however, does not apply to compensation due in respect of obligations arising from the acts of the owner of the vessel. Subparagraph 1 of article 2 seems to import strict liability, in referring to injuries arising out of acts of the owner.

67. Thirty-two years later, another treaty on the same subject was concluded. The International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships of 10 October 1957 92/ also introduces the concepts of "fault" and "strict liability", but rather differently from those in the 1924 Convention. Under article 1 of the 1957 Convention, the owner of a seagoing ship may limit his liability in respect of:

"(a) Loss of life of, or personal injury to, any person being carried in the ship, and loss of, or damage to, any property on board the ship;

(b) Loss of life of, or personal injury to, any other person, whether on land or on water, loss of or damage to any other property or infringement of any rights caused by the act, neglect or default of any person on board the ship for whose act, neglect or default the owner is responsible or any person not on board the ship for whose act, neglect or default the owner is responsible: ..."

68. These subparagraphs seem to have imposed liability for the owners of sea-going vessels on the basis of both "fault" and "strict liability". The

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90/ Emphasis added.

91/ Emphasis added.

92/ United Kingdom Treaty Series, Treaty No. 52 (1968), Cmnd. 353.

limitation of liability does not apply if "the occurrence giving rise to the claim resulted from the actual fault or privity of the owner". 93/ Clearly the clause refers to "fault" and sets a rather stringent qualification for it, namely "actual fault" of the owner. The two treaties considered above do not address the question of State liability.

69. One of the main goals of the 1957 Convention, in addition to the limitation of liability of the owners of ships, was to deal with jurisdictional questions. The Convention attempts to attract all suits brought in relation to a particular case to the jurisdiction in which the limitation fund is established or where pollution damage has been suffered. 94/

70. Gradually, oil pollution, either as the result of general navigation or transportation of oil by ships, became a major concern. However, until 1969, there was no multilateral treaty establishing a general liability regime for oil pollution damage. In general, the rules of compensation were governed by various rules of tort law in each State. 95/ Some minor changes were introduced in the 1957 Convention. The Torrey Canyon incident of 1967 provided the necessary background and political pressure for States to agree on a liability regime for oil pollution damage. The International Convention on Civil Liability for Oil Pollution Damage was adopted on November 29, 1969. 96/ This Convention addressed four important issues: (a) removing jurisdictional obstacles for coastal States in securing compensation; (b) harmonizing a liability regime which up to that time was based on some general rules of tort law; (c) ensuring that polluter pay adequate compensation for damage it causes; and (d) distributing costs in view of the 1957 Convention on the limitation of liability of owners of seagoing vessels. 97/

71. The 1969 Convention definition of "pollution damage" in article 1 (6) was unclear. It defines "pollution damage" as loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures. The interpretation of this definition was left to domestic courts for whom restoration of the environment was considered to

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93/ Emphasis added.

94/ See David W. Abecassis and Richard L. Jarahow, Oil Pollution from Ships, 2nd ed. 1985, pp. 189-130 and 194.

95/ Ibid. p. 181.

96/ IMCO, Official Records of the International Legal Conference on Marine Pollution Damage, London, 1969.

97/ See Patricia W. Birnie and Alan E. Boyle, International Law and the Environment, 1992, pp. 292-293, and Abecassi and Jarashow, pp. 181-182.

be included in the notion of damage. 98/ The 1984 Protocol to the 1969 Convention clarified the meaning of pollution damage. Under the new definition, compensation is limited to "the costs of reasonable measures of reinstatement actually undertaken or to be undertaken". The new definition also allows compensation for loss of profit arising out of impairment of the environment. Though clearer from the one in the 1969 Convention, this definition is rather limited in scope. 99/ The limited nature of the definition has been characterized as follows:

> "It stops short of using liability to penalize those whose harm to the environment cannot be reinstated, or qualified in terms of property loss or loss of profits, or which the Government concerned does not wish to reinstate. To this extent the true environmental costs of oil transportation by sea continue to be borne by the community as whole, and not by the polluter." 100/

72. The 1984 Protocol also established a fund. Once a claimant exhausts the procedure for collecting liability under the 1969 Convention, he may then follow the procedure for liability under the IOPC Fund. Liability under the Fund is also strict subject to limited defences. Both private claimant and shipowner can institute claims under the 1971 IOPC Fund. The IOPC Fund is financed by levying contributions from those who have received crude oil and fuel oil in the territory of contracting States. The Fund is governed by an Assembly of all contracting States to the 1971 Convention. The IOPC Fund of 1984 is governed by the contracting States to that protocol.

73. Ship owners of States not party to the 1969 Convention or the 1971 Fund have also devised a scheme to provide additional compensation. 101/

74. As regards nuclear damage, the regimes of liability have been more diverse than in the case of oil pollution. These regimes seem to allow for greater accountability for States - a variation that may be explained by the ultra-hazardous nature of nuclear activity and its possible widespread and

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98/ See Abecassi and Jarashow, pp. 209-210. Commonwealth of Puerto Rico v. S.S. Zoe Colocotroni, 456 F. Suppl. 1327; 628 F2d 652 (1980).

99/ See Birinie and Boyle, p. 295, and Abecassi and Jarashow, pp. 237, 277.

100/ Birinie and Boyle, p. 296.

101/ See Abecassi and Jarashow, Chap. 12. The Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution of 7 January 1969 applies to tanker owners and the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution of 14 January 1971 provides a fund comparable to the 1971 Fund. For the texts of these agreements see Int'l L. Mat. vol. 8, p. 497 and ibid., vol. 10, p. 137 respectively.

long lasting damage. 102/ In terms of treaty regimes, however, civil liability remains the main vehicle for collection of damages.

75. Strict liability has also been provided for in the Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) of 10 October 1989. 103/ Article 5 of this Convention provides that "the carrier at the time of an incident shall be liable for damage caused by any dangerous goods during their carriage by road, rail or inland navigation vessel". Paragraphs 2 and 3 of the same article also provide for joint and several liability of the carriers.

76. The same approach to liability has been adopted in the Draft International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS). 104/

77. Article 1 of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment adopted on 9 March 1993 by the Council of Europe sets forth the object and purpose of the Convention as follows:

> "This Convention aims at ensuring adequate compensation for damage resulting from activities dangerous to the environment and also provides for means of prevention and reinstatement."

78. The Convention establishes a strict liability regime for "dangerous activities", because such activities constitute or pose "a significant risk to man, the environment or property". It defines in article 2 "dangerous activities" and "dangerous substances". 105/

102/ See Jenks, in Recueil des cours, vol. 117, 1966, p. 105; Smith, State Responsibility and the Marine Environment, 1987, pp. 112-115; Handl, in Netherlands Yearbook of International Law, vol. 16, 1985 and Goldie, in ibid.

103/ For the Convention see Revue de droit uniforme (UNIDROIT)), 1989 (I), p. 280.

104/ For the draft convention see IMO doc. LEG 72/4/Corr.1 of 3 March 1995. See paragraph 1 of article 4 of the draft convention.

105/ Article 4 of the Convention specifies exceptions where the Convention is not applicable. The Convention therefore does not apply to damage caused by a nuclear substance arising from a nuclear incident regulated by the Paris Convention of 1960 and its Additional Protocol or the by Vienna Convention of 1963; nor to damage caused by a nuclear substance if liability for such damage is regulated by internal law and that such liability is as favourable with regard to compensation as the Convention. The Convention does not apply to the extent that it is incompatible with the rules of the applicable law relating to workmen's compensation or social security schemes.

79. As regards the causal link between the damage and the activity, article 10 of the Convention provides that "the court shall take due account of the increased danger of causing such damage inherent in the dangerous activity."

80. Article 8 of the Convention on the Regulation of Antarctic Mineral Resource Activities adopted on 2 June 1988 establishes the liability of the Sponsoring State if that State failed to perform certain obligations. 106/

81. This is a unique form of accountability of the Sponsoring State, even though, theoretically, it arises from failure to perform obligations (responsibility for wrongful acts). The difference between this form of accountability and "responsibility" derives from (a) the triggering element of accountability, and (b) the consequences of accountability, both of which resemble "liability" and not classical "responsibility" doctrine. As for the triggering element, contrary to State responsibility, the failure to perform an obligation is insufficient, by itself, to entail responsibility. There should always be damage or injury, the sine qua non of a liability doctrine. As regards remedies, the normal ones of State responsibility, namely, cessation, restitution, damages, satisfaction do not arise in this case. The accountability of the Sponsoring State normally is limited only to that portion of liability not satisfied by the operator or otherwise, a consequence which arises under the doctrine of subsidiary liability. This may explain the reason for the use of the term "liability" of State instead of responsibility of States in the Antarctic Convention. 107/

82. Principles 8 and 9 of the Principles Relevant to the Use of Nuclear Power Sources in Outer Space adopted by resolution 47/68 of the General Assembly on 14 December 1992 is another example illustrating the differences between the two types of accountability of States. Principle 8 provides for State responsibility, namely that States shall bear responsibility for national activities in the use of nuclear power sources in outer space and for the conformity of such activities with these Principles. Principle 9 entitled "Liability and compensation", points to a different type of State accountability. It holds a State which launches or procures the launching of a space object and a State from whose territory or facility a space object is launched "internationally liable" for damage caused by such space objects or their component parts. When there are two or more States jointly launching

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106/ For the Convention see, Int'l L. M., vol. 28, p. 868.

107/ For a different view see Goldie, "Transfrontier Pollution - From Concepts of Liability to Administrative Conciliation", Syracuse Journal of International Law and Commerce, vol. 12, 1985, p.185. In his view "reponsibility is taken to indicate a duty, or as denoting the standards which the legal system imposes on performing a social role, and liability is seen as designating the consequences of a failure to perform the duty, or to fulfill the standards of performance required." Therefore, "liability connotes exposure to legal redress once responsibility has been established and injury arising from a failure to fulfil that legal responsibility has been established." Ibid., pp. 185-186. See also Goldie, "Concepts of Strict and Absolute Liability and the Ranking of Liability in Terms of Relative Exposure to Risk", Netherlands Yearbook of International Law, vol. XVI, 1985, p. 175.

such a space object, their liability is joint and several. The Principle relies on and makes reference to the Convention on International Liability for Damage Caused by Space Objects.

83. Since the adoption of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, an ad hoc working group of legal and technical experts has been drafting the protocol on liability and compensation for damage resulting from transboundary movements of hazardous wastes and their disposal. The purpose of the draft protocol is to provide for a comprehensive regime for liability and for adequate and prompt compensation, including reinstatement of the environment, for damage resulting from the transboundary movement of hazardous wastes and other wastes and their disposal. The 1994 draft text of the protocol 108/ aims at the establishment of strict liability. The various alternatives provided in article 4 of the draft protocol all impose strict liability.

84. The second category of treaties addressing the question of liability are those treaties which hold States directly liable. Currently, there is one treaty which falls completely into this category, namely, the Convention on International Liability for Damage Caused by Space Objects of 1972. 109/ This Convention is rather unique in the sense that it gives the choice to the injured party as to whether to pursue a claim for compensation through domestic courts or follow through a direct claim against the State. The latest proposal on a draft Protocol to the Basel Convention on Transboundary Movements of Hazardous Wastes and Their Disposal contains three alternatives on liability one of which is holding the licensing State liable for the damage caused.

85. The third category of treaties include those in which a reference to liability has been made without any further clarification as to the substantive or procedural rules of liability. These treaties while recognizing the relevance of the liability principle, to the operation of the treaties, do not resolve the issue. They seem to rely on the existence in international law of liability rules, or to expect that such rules will be developed. A number of treaties belong to this category. For example, the 1978 Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment for Pollution provides that the contracting States shall co-operate in formulating rules and procedures for civil liability and compensation for damage resulting from pollution of the marine environment,

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108/ See document UNEP/CHW.1/WG.1/2/4 of 24 October 1994. A Convention similar to the Basel Convention was drafted by the Organization of African Unity entitled "Bambako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa" done on 29 January 1991. Article 12 of this Convention is entitled "liability and compensation" and provides that the Conference of Parties shall set up an Ad Hoc expert organ to prepare a draft Protocol setting out appropriate rules and procedures regarding liability and compensation for damage resulting from the transboundary movement of hazardous wastes. For the Convention see, Int'l L. Mat., vol 30, 1991, p. 773.

109/ UNTS, vol. 961, p. 187.

but it does not stipulate those rules and procedures. 110/ Similar requirements are established in the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 111/, the 1974 Convention on the Protection of the Marine Environment of the Baltic Sea Area, 112/ the 1976 Convention for the Protection of the Mediterranean Sea against Pollution, 113/ the 1992 Convention on the Transboundary Effects of Industrial Accidents 114/ and the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes. 115/ The 1984 Antarctic treaty makes the development of liability rules a precondition for the exploration and exploitation of mineral resources of Antarctica.

(b) Judicial decisions and State Practice outside treaties

86. The concept of liability for damage caused by an activity beyond the territorial jurisdiction or control of the acting State appears to have been developed through State practice to a limited extent for some potentially harmful activities. Some sources refer to the concept in general terms, leaving its content and procedure for implementation to future developments. Other sources deal with the concept of liability only in a specific case.

87. In the past, liability has been considered as an outgrowth of failure to exercise "due care" or "due diligence". In determining whether there has been a failure to exercise due diligence, the test has been that of balancing of interest. This criterion is similar to that used in determining harm and the permissibility of harmful activities, given the assessment of their impact. Liability for failure to exercise due care was established as early as 1872, in the Alabama case. In that dispute between the United States and the United Kingdom over the alleged failure of the United Kingdom to fulfil its duty of neutrality during the American Civil War, both sides attempted to articulate what "due diligence" entailed. The United States argued that due

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110/ See article XIII of the Convention. United Nations, Treaty Series, vol. 1140, p. 133.

111/ United Nations, Treaty Series, vol. 1046, p. 120.

112/ UNEP, Selected Multilateral Treaties in the Field of the Environment, ref. series 3 (Nairobi, 1983), p. 405.

113/ UNEP, Selected Multilateral Treaties ...., ibid., p. 448.

114/ Int'l L. Mat., vol. 31, p. 1330.

115/ Ibid., p. 1312.

diligence was proportioned to the magnitude of the subject and to the dignity and strength of the power which was to exercise it. 116/

88. By contrast, the British Government argued that, in order to show lack of due diligence and invoke the liability of a State, it must be proved that there had been a failure to use, for the prevention of a harmful act, such care as Governments ordinarily employed in their domestic concern. 117/

89. The tribunal referred to "due diligence" as a duty arising "in exact proportion to the risks to which either of the belligerent may be exposed from a failure to fulfil the obligations of neutrality on their part". 118/ Thus, due diligence is a function of the circumstances of the activity.

90. Later State practice appears not to have dealt so much with State liability arising out of failure to exercise due care, except in the area of

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116/ The United States argued that:

> "The rules of the treaty, said the Case of the United States, imposed upon neutrals the obligation to use due diligence to prevent certain acts. These words were not regarded by the United States as changing in any respect the obligations imposed by international law. The United States, said the Case, understands that the diligence which is called for by the rules of the treaty of Washington is a due diligence-that is, a diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it; a diligence which shall, by the use of active vigilance, and of all the other means in the power of neutral, through all stages of the transaction, prevent its soil from being violated; a diligence that shall in like manner deter designing men from committing acts of war upon the soil of the neutral against its will, and thus possibly dragging it into war which it would avoid; a diligence which prompts the neutral to the most energetic measures to discover any purpose of doing the acts forbidden by its good faith as a neutral, and imposes upon it the obligation, when it receives the knowledge of an intention to commit such acts, to use all the means in its power to prevent it. No diligence short of this would be 'due', that is, commensurate with the emergency or with the magnitude of the results of negligence...."

J.B. Moore, International Arbitrations to which the United States has been a Party (Washington, D.C. 1898), vol. 1, pp. 572-573.

117/ "... it was necessary to show that there had been a 'failure to use, for the prevention of an act which the government was bound to endeavour to prevent, such care as governments ordinarily employ in their domestic concerns, and may reasonably be expected to exert in matters of international interest and obligation'." Ibid., p. 610.

118/ Ibid., p. 654.

the protection of aliens. These categories of claims include nationalization and confiscation of foreign properties, police protection and safety of foreigners, etc. which have been excluded from this Study.

91. In the claim against the former USSR for damage caused by the crash of the Soviet satellite Cosmos 954 on Canadian territory in January 1978, Canada referred to the general principle of the law of "absolute liability" for injury resulting from activities with a high degree of risk. 119/

92. Similarly, in the Trail Smelter awards, the smelter company was permitted to continue its activities. The Tribunal did not prohibit the activities of the smelter, it merely reduced its activities to a level at which the fumes which the smelter emitted were no longer, in the opinion of the Tribunal, injurious to the interests of the United States. The Tribunal established a permanent regime which called for compensation for injury to United States interests arising from fume emissions even if the smelting activities conformed fully to the permanent regime as defined in the decision:

> "The Tribunal is of the opinion that the prescribed regime will probably remove the causes of the present controversy and, as said before, will probably result in preventing any damage of a material nature occurring in the State of Washington in the future.
>
> But since the desirable and expected result of the regime or measure of control hereby required to be adopted and maintained by the Smelter may not occur, and since in its answer to Question No. 2, the Tribunal has required the Smelter to refrain from causing damage in the State of Washington in the future, as set forth therein, the Tribunal answers Question No. 4 and decides that on account of decisions rendered by the Tribunal in its answers to Question No. 2 and Question No. 3 there shall be paid as follows: (a) if any damage as defined under Question No. 2 shall have occurred since October 1, 1940, or shall occur in the future, whether through failure on the part of the Smelter to comply

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119/ Canada argued that:

> "The standard of absolute liability for space activities in particular activities involving the use of nuclear energy is considered to have become a general principle of international law. A large number of States, including Canada and the Union of Soviet Socialist Republics, have adhered to this principle as contained in the 1972 convention on International Liability for damage caused by Space Objects. The principle of absolute liability applies to fields of activities having in common a high degree of risk. It is repeated in numerous international agreement and is one of 'the general principles of law recognized by civilized nations' (Article 38 of the Statute of the International Court of Justice). Accordingly, this principle has been accepted as a general principle of international law."

See Int'l L. Mat., vol. 18. p. 907, para. 22.

with the regulations herein prescribed or notwithstanding the maintenance of the regime, an indemnity shall be paid for such damage but only when and if the two Governments shall make arrangements for the disposition of claims for indemnity under the provisions of article XI of the Convention (b) if as a consequence of the decision of the Tribunal in its answers to Question No. 2 and Question No. 3, the United States shall find it necessary to maintain in the future an agent or agents in the area in order to ascertain whether damage shall have occurred in spite of the regime prescribed herein, the reasonable cost of such investigations not in excess of USD7,500 in any one year shall be paid to the United States as compensation but only if and when the two Governments determine under article XI of the Convention that damage has occurred in the year in question, due to the operation of the Smelter, and "disposition of claims for indemnity for damage" has been made by the two Governments; but in no case shall the aforesaid compensation be payable in excess of the indemnity for damage; and further it is understood that such payment is hereby directed by the Tribunal only as a compensation to be paid on account of the answers of the Tribunal to Question No. 2 and Question No. 3 (as provided for in Question No. 4) and not as any part of indemnity for the damage to be ascertained and to be determined upon by the two Governments under article XI of the Convention." 120/

93. The standard for imposing liability on the State under whose control an injurious condition exists is even more obfuscated in the decision of 9 April 1949 in the Corfu Channel case (merits). There the International Court of Justice found that Albania had known or should have known of the mines lying within its territorial waters in sufficient time to give warning to other States and their nationals. The Court found that:

"In fact nothing was attempted by the Albanian authorities to prevent the disaster. These grave omissions involve the international responsibility of Albania.

"The Court therefore, reaches the conclusion that Albania is responsible under international law for the explosions which occurred on October 22nd. 1946, in Albanian waters, and for the damage and loss of human life which resulted from them, and that there is a duty upon Albania to pay compensation to the United Kingdom." 121/

94. Owing to the difficult and circumstantial nature of the proof of Albania's knowledge of the injurious condition, it is unclear whether

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120/ United Nations, Reports of International Arbitral Awards, vol. III, pp. 1980-1981.

121/ I.C.J., Reports 1949, p. 23.

liability was based on a breach of the duty of due care in warning other international actors or on a standard of "strict liability" without regard to the concept of due care.

95. In the same judgment, the International Court of Justice made some general statements regarding State liability which are of considerable importance. In one passage, the Court stated that it was "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States". 122/ It should be noted that in this passage the Court was making a general statement of law and policy, not limited or narrowed to any specific case. When the Court renders a decision in a case in accordance with Article 38 of its Statute, it may also declare general statements of law. The aforementioned passages are among such statements. It may therefore be concluded that, while the Court's decision addressed the point debated by the parties in connection with the Corfu Channel, it also stressed a more general issue. It was a declaratory general statement regarding the conduct of any State which might cause extraterritorial injuries.

96. It has been argued that the Trail Smelter awards or the Corfu Channel judgement do not necessarily support the existence of strict liability in international law. As regards Trail Smelter, according to this view, "it was not necessary for the Tribunal to decide, in an either/or sense, between strict liability and negligence as the requisite standard of care at international law." 123/ The decision in the Corfu Channel, according to the same view, does not subscribe "to a theory of objective risk, if by that is meant that a State is automatically liable at international law for all the consequences of its act, whatever the circumstances may be." 124/ It has also been suggested that on the basis of this judgement "the possibility, if no more, remains ... that the defence of reasonable care might be raised by the defendant State." 125/

97. In opposition to this view, it has been argued that in both of these cases, liability was imposed without proof of negligence. 126/ As regards the view expressed in the above paragraph regarding the Corfu Channel,

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122/ Ibid., p. 22.

123/ M.J.L. Hardy, "International Protection Against Nuclear Risks", Int'l & Comp. L. Q., vol. 10, p. 751, 1961. See also Hardy, "Nuclear Liability: the General Principles of Law and Further Proposals", Brit. Y. B. I. L., vol. 36, p. 229, 1960.

124/ Hardy, "Nuclear Risks..." ibid, p. 751, and in "Nuclear Liability ...", ibid., p. 229.

125/ "Nuclear Liability ...", ibid., p. 229.

126/ L.F.E. Goldie, "Liability for Damage and the Progressive Development of International Law", Int'l & Comp. L.Q., vol. 14, p. 1231, 1965.

attention has been drawn to the dissents by Judges Winiarski 127/ and Badawi Pasha 128/ in which they argued that Albania had not breached any duty of care, that she had complied with existing international law standards and that the Court was imposing novel and higher standards. It has been observed that in this case the plaintiff State did not "affirmatively prove the defendant's negligence or wilful default." 129/

98. In the Lake Lanoux case, on the other hand, the tribunal, responding to the allegation of Spain that the French projects would entail an abnormal risk to Spanish interest, stated that only failure to take all necessary safety precautions would have entailed France's responsibility if Spanish rights had in fact been infringed. 130/

127/ I.C.J. Reports, 1949, pp. 49-51, 52 and 55-56.

128/ Ibid., pp. 64-66.

129/ Goldie, op cit. p. 1231.

Sohn and Baxter, in 1961, evaluated the standing in international law of strict liability. They indicated as a matter of lex ferenda:

> "The concept of absolute liability, or liability without fault, might possibly be applied to two general types of situations: The first of these would be a violation of the territory of State A by State B with resulting damage to property of life in State A, notwithstanding the fact that State B did not intend either the violation of territory or the resulting harm and that it took all possible precautions against the causing of injury. In terms of modern technology, a case of this sort might be imagined if a missile which were [sic] tested by State B should, without intent or negligence upon the part of State B, enter airspace of State A, fall to the ground, and cause injury there to nationals of State A. The second instance in which absolute liability might exist would be the conduct of extra-hazardous activities with resultant harm to aliens. A test of nuclear weapons over the high seas which resulted in injuries to aliens might be said to represent a case of absolute liability, despite a lack of intent to cause harm and an absence of negligence in the conduct of the testing."

Sohn and Baxter, "Convention on the International Responsibility of States for Injuries to Aliens", (Draft NO. 12 with Explanatory Notes) of April 15, 1961, pp. 70-71.

130/ The tribunal stated:

> "The question was lightly touched upon in the Spanish counter memorial, which underlined the "extraordinary complexity" of procedures for control, their "very onerous" character, and the "risk of damage or of negligence in the handling of the watergates, and of obstruction in the tunnel. But it has never been alleged

99. In other words, responsibility would not arise as long as all possible precautions against the occurrence of the injurious event had been taken. Although the authority of the tribunal was limited by the parties to the examination of compatibility of French activities on the Carol River with a treaty, the tribunal also touched on the question of dangerous activities. In the passage quoted above, the tribunal stated: "It has not been clearly affirmed that the proposed works [by France] would entail an abnormal risk in neighbourly relations or in the utilization of the waters." This passage may be interpreted as meaning that the tribunal was of the opinion that abnormally dangerous activities constituted a special problem, and that, if Spain had established that the proposed French project would entail an abnormal risk of injury to Spain, the decision of the tribunal might have been different.

100. In the Nuclear Tests Case, the International Court of Justice, in making the Order of 22 June 1973 took note of Australia's concerns that "the atmospheric nuclear explosions carried out by France in the Pacific have caused wide-spread radio-active fall-out on Australian territory and elsewhere in the southern hemisphere, have given rise to measurable concentrations of radio-nuclide in foodstuffs and in man, and have resulted in additional radiation doses to persons living in that hemisphere and in Australia in particular; that any radio-active material deposited on Australian territory will be potentially dangerous to Australia and its people and any injury caused thereby would be irreparable; that the conduct of French nuclear tests in the atmosphere creates anxiety and concern among the Australian people; that any effects of the French nuclear tests upon the resources of the sea or the conditions of the environment can never be undone and would be irremediable by any payment of damages; and any infringement by France of the rights of Australia and her people to freedom of movement over the high seas and superjacent airspace cannot be undone;". 131/ In his dissenting opinion, Judge Ignacio-Pinto, while expressing the view that the Court lacked jurisdiction to deal with the case, stated that "if the Court were to adopt the contention of the Australian request it would be near to enforcing a novel conception in international law whereby States would be forbidden to engage in

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that the works envisaged present any other character or would entail any other risks than other works of the same kind which today are found all over the world. It has not been clearly affirmed that the proposed works would entail an abnormal risk in neighbourly relations or in the utilization of the waters. As we have seen above, the technical guarantees for the restitution of the waters are as satisfactory as possible. If, despite the precautions that have been taken, the restitution of the waters were to suffer from an accident, such an accident would be only occasional and, according to the two Parties, would not constitute a violation of article 9."

International Law Reports (1957), pp. 123-124, para. 6 of the award.

131/ Nuclear Tests Case (Australia v. France), (Order of 22 June 1973), 1973 I.C.J. Reports. p. 104. The Court did not rule on merits of the case.

any risk-producing activity within the area of their own territorial sovereignty; but that would amount to granting any State the right to intervene preventively in the national affairs of other States." 132/ He further stated that "[i]n the present state of international law, the 'apprehension' of a State, or 'anxiety', 'the risk of atomic radiation', do not in my view suffice to substantiate some higher law imposed on all States and limiting their sovereignty as regards atmospheric nuclear tests." 133/ In his view, "[t]hose who hold the opposite view may perhaps represent the figure-heads or vanguard of a system of gradual development of international law, but it is not admissible to take their wishes into account in order to modify the present state of law." 134/

132/ Ibid., p. 132.

133/ Ibid.

134/ Ibid.

CHAPTER II. THE PARTY THAT IS LIABLE

101. In examining the issue of liable party, reference should be made to the "polluter-pays principle" a principle developed first by OECD in 1972. This principle is different from the principle of operator's liability provided for in many civil liability conventions. Therefor, this section of the Study provides an overview of the "polluter-pays principle" and then examines the issue of the party that is liable in international law.

A. POLLUTER-PAYS PRINCIPLE

1. Historical development

102. The "polluter-pays principle" was enunciated by the Council of the OECD in 1972. In its publication "Guiding Principles Concerning International Economic Aspects of Environmental Policies", Recommendation C(72) adopted on 26 May 1972, the OECD recommended:

> "The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortion in international trade and investment is the so-called 'polluter-pays principle'. This principle means that the polluter should bear the expenses of carrying out the above-mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortion in international trade and investment."

103. The polluter-pays principle holds the polluter who creates an environmental harm liable to pay compensation and the costs to remedy that harm. This principle was set out by the OECD as an economic principle and as the most efficient way of allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment. The basis of the polluter-pays principle was the "assertion that as a matter of economic policy, free market internationalization of the costs of publicly-mandated technical measures is preferable to the inefficiencies and competitive distortions of governmental subsidies". 135/

104. The polluter-pays principle was not set forth as a liability or a legal principle. Two years later, in 1974, the OECD published a note on the implementation of the polluter-pays principle. That note was adopted as recommendation C(74) on 14 November 1974.

135/ Sandord E. Gaines, "The Polluter-pays Principle: From Economic Equity to Environmental Ethos", Texas International Law Journal, vol. 26, 1991, p. 470.

105. The OECD recommendation on the implementation of the polluter-pays principle reaffirms the economic basis of the principle. The relevant parts of the recommendation read as follows:

> "1. The polluter-pays principle constitutes for Member countries the fundamental principle for allocating costs of pollution prevention and control measures introduced by the public authorities in Member countries;
>
> The polluter-pays principle, as defined by the Guiding Principle concerning International Economic Aspects on Environmental Policy, which take account of the particular problems possibly arising for developing countries, meant that the polluter should pay the expenses of carrying out the measures, as specified in the previous paragraph, to ensure that the environment is in an acceptable state. In other words, the cost of these measures should be reflected in the cost of goods and services which cause pollution introduction and/or consumption;"

106. The recommendation goes on to indicate that the uniform application of this principle by the Member countries in their environmental policies is indispensable to successful implementation of the principle. It discourages States from providing any financial relief either in terms of subsidies or tax reliefs to their industries causing pollution. Its economic objective is to internalize the cost of environmental pollution. Internalizing, in this context, refers to the industry that causes the pollution. With the exception of a few cases, it discourages States in assisting the industry in the payment of that cost. Under this economic theory, the const of pollution control will be borne by the users of the goods and services produced by that industry.

107. On 7 July 1989, the OECD recommendation C(89) extended the scope of the polluter-pays principle beyond chronic pollution caused by ongoing activities to cover accidental pollution. The appendix to the recommendation on Guiding Principles Relating to Accidental Pollution provides, in paragraph 4, that "in matters of accidental pollution risks, the polluter-pays principle implies that the operator of a hazardous installation should bear the cost of reasonable measures to prevent and control accidental pollution from that installation which are introduced by public authorities in Member countries in conformity with domestic law prior to the occurrence of an accident in order to protect human health or the environment".

108. The Guiding Principles provide that for reasons of convenience, the operator or the administrator should bear the cost. When a third party is liable for the accident, that party reimburses to the operator the cost of reasonable measures to control accidental pollution taken after an accident (para. 6). The recommendation also provides that if the accidental pollution is caused solely by an event for which the operator clearly cannot be considered liable under national law, such as a serious natural disaster that the operator cannot reasonably have foreseen, it is consistent with the polluter-pays principle that the public authorities do not charge the cost of control measures to the operator.

109. The European Community Council also adopted its own recommendation on the application of the polluter-pays principle on 7 November 1974. 136/ That recommendation defined "polluter" as "someone who directly or indirectly damages the environment or who creates conditions leading to such damage". 137/ This is a broad definition which has been criticized as possibly including automobile drivers and farmers and factory owners and community sewage treatment plants. 138/ If the class of responsible polluters cannot be clearly defined, the European Community Commission recommends that the Government allocate costs with a view to administrative as well as economic efficiency. 139/

110. Paragraph 3 of the recommendation of the European Community Commission provides that if identifying the polluter proves impossible or too difficult, and hence arbitrary, particularly where environmental pollution arises from several simultaneous causes, cumulative pollution, or from several consecutive causes, pollution chain, the cost of combatting polluting should be borne at the point in the pollution chain or in the cumulative pollution process, and by the legal or administrative means which offer the best solution from the administrative and economic points of view and which make the most effective contribution towards improving the environment. Thus, in the case of pollution chains, costs should be charged at the point at which the number of economic operators is least and control is easiest or else, at the point where the most effective contribution is made towards improving the environment, and where distortions to competition are avoided.

111. As regards what the polluters should pay for, the European Community Commission provides in paragraph 5 that polluters will be obliged to bear:

> "(a) Expenditure of Pollution Control Measures (investment in anti-pollution installations and equipment, introduction of new processes, cost of running anti-pollution installations, etc.), even when these go beyond the standards laid down by the public authorities;
>
> (b) The charges:
>
> The costs to be borne by the polluter (under the 'polluter-pays principle') should include all the expenditure

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136/ Council Recommendation on the Application of the Polluter-pays Principle, 7 November 1974, Int'l L. M., vol. 14, 1975, p. 138.

137/ See Council Recommendation Regarding Cost Allocation and Action by Public Authorities on Environmental Matters, O.J. Eur. Comm. No. L194, vol. 18, 1975, p. 2, para. 3.

138/ See Gaines, op cit., p. 472.

139/ See Council Recommendation Regarding Cost Allocation ... op cit., p. 2, para. 3.

necessary to achieve an environmental quality objective including the administrative costs directly linked to the implementation of anti-pollution measures.

The costs to the public authorities of constructing, buying and operating pollution monitoring and supervision installations may, however, be borne by those authorities."

112. The European Community have committed themselves to the polluter-pays principle. That commitment appears in the Single European Act of 1987 which amended the Treaty of Rome. The Act granted the European Community for the first time the express power to regulate environmental affairs. The Single European Act specifically refers to the polluter-pays principle as a principle governing such regulations and states that "Action by the Community relating to the environment shall be based on the principle that preventive action should be taken, that environmental damage should as a priority be rectified at the source, and that the polluter should pay." (Art. 100 (r)2). The European Community has also been applying the polluter-pays principle to the sources of pollution. For example, the Community has approved a directive which expressly instructed Member States to impose the costs of waste control on the holder of waste and/or on prior holders or the waste generator in conformity with the polluter-pays principle. 140/

113. In practice, polluter-pays principle has not been fully implemented. A report prepared by OECD in 1989, indicated that subsidies are widely used by Governments to ease the economic burden of the polluter. In addition, in practice, each State member of the European Community has also developed its own interpretation of the polluter-pays principle "to justify its subsidy schemes as being compatible with the principle". 141/

114. The United States does not officially recognize the polluter-pays principle, even though, in practice, it follows its precepts. 142/ Japan, another OECD member, appears to have ignored the polluter-pays principle as a specific policy mandate and indeed, follows a policy of strong government intervention in the industrial sector. 143/

140/ Council directive of 6 December 1984 on the Control within the European Community of the Transfrontier Shipment of Hazardous Waste, 270. J.EUR. COMM. (No. L326) 31, 1984.

141/ Gaines, op cit., p. 479.

142/ Ibid., p. 480. According to Gaines, with one exception: the sewage construction treatment grant program under the Clean Water Act, gives almost no subsidies or any grants for pollution control. Also in the Clean Air Act amendments of 1990, Congress enacted a permit fee structure that adheres closely to the polluter-pays principle.

143/ Ibid.

115. As mentioned earlier, the application of the polluter-pays principle has been extended to accidental environmental pollution which includes industrial pollution both by the OECD and by the European Community. 144/

116. It should be noted, however, that the liability and compensation components of the polluter-pays principle cover only two types of costs: (1) the cost of "reasonable measures to prevent ... accidental pollution" (OECD recommendation) and (2) the cost of controlling and remedying accidental pollution. 145/ The polluter-pays principle does not seem to cover all the damages that are recoverable in civil liability régimes. The guiding principles expressly exclude, for instance, measures to compensate victims for the economic consequences of an accident, even if those measures are instituted by public authorities. 146/

117. The OECD and the European Community have, to some extent, departed from the strict application of the polluter-pays principle. Due to political and economic pressures, the principle has been modified to a great extent. 147/

2. Component elements of the polluter-pays principle

(a) The Right of Equal Access

118. Equal access to national remedies has been considered as one way of implementing the polluter pays principle. This remedy has been endorsed by the OECD and it purports to afford equivalent treatment in the country of

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144/ See, the OECD recommendation on the application of the polluter-pays principle to accidental pollution (Recommendation C(89)) adopted on 7 July 1989. The 1991 European Community amended proposed directive on civil liability for damage caused by waste is also based on principles similar to polluter-pays (91/C 192/04). See Gaines, op cit., pp. 482-483.

145/ See Gaines, op cit., p. 483-484. Gaines points out that some of the costs involved in the control of accidental pollution may be prevention-oriented, but some others may be strongly remedy-oriented. Among the costs mentioned by the OECD Guidelines on Principles relating to Accidental Pollution are, for example, costs such as those involved in rehabilitating the polluted environment. The choice and types of environmental rehabilitation take the polluter-pays principle fairly far towards a liability concept for what polluters should pay. In the United States, for example, if a source of accidental pollution is responsible for restoration of the environment, that responsibility is considered a measure for compensation of damage inflicted, not a preventive or protective measure. A similar approach is evident in the natural resources section of the United States Statute that imposes liability for remedial costs of hazardous waste clean-up. For example, in the case Ohio v. Department of the Interior, the Court held that the cost of restoration was the preferred measure of damages. See 880 F.2d 432, at page 444, 1989.

146/ Gaines, op cit., pp. 483-485.

147/ Ibid.

origin to transboundary and domestic victims of pollution damage, or to those likely to be affected. The equal right of access may involve access to information, participation in administrative hearings and legal proceedings and the application of non-discriminatory standards for determining the illegality of domestic and transboundary pollution. The purpose of the right of equal access is to provide foreign claimants, on an equal footing with domestic claimants, opportunities to influence the process of initiation, authorization and operation of activities with transboundary implications for pollution damage as well as, ultimately, the litigation phase.

119. The implementation of the principle of equal access to national remedies requires that participating States remove jurisdictional barriers to civil proceedings for damages and other remedies in respect of environmental injury. For example, the courts of some States do not hear cases where the installation or the conduct leading to injury was in a foreign territory.

120. The recommendation by the OECD notes that the principles of equal right of access and non-discrimination are intended to facilitate the solution of transfrontier pollution problems. As for the principle of equal right of access, the OECD defines its purpose in the following manner:

> "The principle of equal right of access is designed to make available to actual or potential 'victims' of transfrontier pollution, who are in a country other than that where the pollution originates, the same administrative or legal procedures as those enjoyed by potential or actual 'victims' of a similar pollution in the country where such pollution originates. The application of the principle leads, in particular, to situation where two 'victims' of the same transfrontier pollution situated on opposite sides of a common frontier have the same opportunity to voice their opinions or defend their interests both at the preventive stage before the pollution has occurred and in the curative stage after damage has been suffered. The national and foreign 'victims' may thus participate on an equal footing at enquiries or public hearings organized, for example, to examine the environmental impact of a given polluting activity, they may take proceedings in relation to environmental decisions which they wish to challenge without discrimination before the appropriate administrative or legal authorities of the country where the pollution originates. And they may take legal action to obtain compensation for damage or its cessation." 148/

121. The OECD recognizes that the principle of equal right of access is essentially a procedural principle, since it does affect the way in which the substance of the victim's claims will be dealt with. The principle of equal right of access has been designed primarily to deal with environmental problems occurring among neighbouring States. Geographical proximity presumes some affinity and similarity between the legal systems of the neighbouring

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148/ OECD, Environment Directive, Equal Right of Access in Relation to Transfrontier Pollution, 1976, Note by the Secretariat.

States and some similarities between their policies for the protection of the environment. A good example is the Convention on the Protection of the Environment between Member Countries of the Nordic Council. The application of this principle in respect of long distance pollution problems may not be practical or so felicitous.

122. As for the principle of non-discrimination, OECD states the following:

> "The principle of non-discrimination, on the other hand, is mainly designed to ensure that the environment is given at least the same protection when pollution has effects beyond the frontier as when it occurs within the territory where it originates, all other things being equal. A particular result of application of the principle is that a polluter situated near the frontier of a country will not be subject to less severe restrictions than a polluter situated in the interior of such a country in a situation where the two polluters produce similar effects on the environment, either at home or abroad. The principle implies indeed that environmental policies shall not be consistently less strict in frontier regions by reason of the fact that it induces a State to consider on an equal footing extraterritorial ecological damages and national ecological damages.
>
> A second aim of the principle is to ensure that the victims of transfrontier pollution situated in a foreign country receive at least the same treatment as that given to victims of the same pollution who are situated in the country where the pollution originates. In concrete terms, such an approach leads to the victims of transfrontier pollution receiving at least the same compensation as that given to a victim suffering the same damage under the same conditions within the national territory." 149/

123. The principle of non-discrimination aims at harmonizing the policies of the State for the protection of the environment within or outside its territory. It also aims at ensuring the foreigners who suffer from the damage the same treatment as that provided under the domestic law of the State in which the damage originated for its own citizens. There is, to some extent, an analogy with the national treatment of aliens in the law of State responsibility. It may be recalled that there are two views in respect of the treatment of aliens under the international law of State responsibility. One view purports to give aliens the same treatment as the domestic law of the host State provides for its own nationals. The other view opts for a minimum standard of treatment to be granted to aliens, when the law of the host State provides for less than the minimum international standard. The principle of non-discrimination, in the context of environmental pollution, may be compared with the principle of equal treatment in the law of State responsibility. The principle of non-discrimination, although it deals with the substantive rights of the claimants, does not affect the substance of the claim directly. The OECD Secretariat, however, suggests that there may be channels available,

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149/ Ibid.

because of equal right of access, to the claimants to petition the Government and administrative authorities of the States where the harm has originated to change their substantive law, as well as to encourage their Governments to negotiate with the Government of the State of the polluter.

124. The potential problem with the application of the principle of non-discrimination in the area of the environment lies in the fact that there are sometimes drastic differences between the substantive remedies provided i various States. Again, because this principle was intended to be applied between neighbouring States, it was assumed that there would be some affinity between even the substantive law of the various States concerned or at least an attempt on their part to harmonize their domestic laws as regards the protection of the environment. A broad application of this principle in respect of long distance pollution problems as well as between neighbouring States with very diverse environmental policies and laws would create considerable problems.

125. Mention may be made, in this context, of the differences between the environmental laws of the United States and Mexico or between some Western European States and their Eastern European neighbours. Even as between the European States, the application of the principle has required some changes domestic laws. The OECD undertook a comparative study on the implementation of the principle of equal right of access in 17 OECD Members, and concluded that difficulties in some countries may be encountered in the implementation of this principle. The first difficulty is related to a long standing tradition in some countries, whereby administrative courts have no jurisdiction to hear cases concerning the extraterritorial effects of administrative decisions. A second difficulty, in a few countries, arises from conferring sole jurisdiction on the courts of the place where the damag occurred. The OECD, while acknowledging the difficulties, nonetheless supported and endorsed the application of the principle of equal right of access within its membership.

126. In North America, the United States and Canada have tried to harmonize their laws to provide for the implementation of the principle of equal right of access. The US/Canadian Uniform Transboundary Reciprocal Act provides a model for appropriate legislation. It has been adopted by a few State legislators, including South Dakota, New Jersey, Colorado and Wisconsin. At the international level, there are few examples. They include the 1974 Nord Convention on the Protection of the Environment and the 1986 Agreement on Third Party Liability between Switzerland and the Federal Republic of German which applies only to nuclear damage. There is at least one bilateral agreement - the 1909 US-Canadian Boundary Waters Treaty (Art. II), which provides for equal right of access, but it is not limited to environmental pollution only.

127. Equal right of access is not without problems. Some authors have mentioned that equal access favours litigation against defendants in the Sta where the activity causing the transboundary harm was undertaken. These authors argue that the courts of the State of the defendants may be more sympathetic to the defendants and less informed about the scope of the transfrontier harm. They suggest that these considerations were behind the jurisdiction regime established under the 1969 Brussels Convention for Oil

Pollution Damage whereby the plaintiffs could choose to sue in their own courts. Other problems are linked to restrictions on service of process on foreign defendants, the possibility that sovereign immunity may be invoked if a State-owned enterprise is the defendant, the double actionability rule, the reluctance of courts to grant injunctive relief relating to activities in other States and the difficulty of securing enforcement or recognition of judgements. These matters may have to be resolved within a particular draft convention, as they are, for example, in the 1969 Oil Pollution Convention.

128. It has been suggested that the plaintiff have a choice of venue between its own courts or the courts of the State where the activity leading to transboundary harm has occurred. Generally, the civil liability conventions do not provide this choice for the plaintiff. Only the 1962 Nuclear Ships Convention and the 1977 Convention on Civil Liability for Oil Pollution Damage from Seabed Exploration and Exploitation provide for a choice of venue. In general these conventions on nuclear liability confer jurisdiction only on the State where the nuclear incident causing the damage occurred. This normally means the State where the nuclear installation is located except in the case of nuclear material in transit. 150/

129. As regards practice at the international level, the Stockholm Declaration or the Rio Declaration did not recognize the principle of the right of equal access. The Law of the Sea Convention appears to uphold the requirement of equal access in its Article 235, paragraph 2 of which reads:

> "States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction."

(b) Civil liability

130. Civil liability regimes have been considered as one other method to implement the polluter-pays principle. These regimes have been used in relation to nuclear and oil pollution. It has been argued that the civil liability conventions do not necessarily implement the polluter-pays principle, since States and voluntary contributions from other sources pay for the polluter.

B. OPERATOR LIABILITY

131. In some of the domestic laws which have adopted the concept of strict liability, the operator of the activity is liable for damage caused. The definition of operator changes depending upon the nature of the activity. For example, under the Oil Pollution Act (OPA) of the United States, the following individuals may be held liable: (a) responsible parties such as the owner or operator of a vessel, onshore and offshore facility, deepwater port and

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150/ See, for example, the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy, Article 13, and the 1963 Vienna Convention on Civil Liability for Nuclear Damage, Article XI.

pipeline; (b) the "guarantor", the "person other than the responsible party, who provides evidence of financial responsibility for a responsible party"; and (c) third parties (individuals other than the those mentioned in the first two categories, their agents or employees or their independent contractors, whose conduct is the sole cause of injury).

132. The United States CERCLA imposes liability on owners and operators of vessels and facilities. 151/ The terms "owner" and "operator" are defined as:

> "(i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel;
>
> (ii) in the case of an onshore facility or an offshore facility, any person owning or operating a facility." 152/

133. Both CERCLA and OPA authorize direct action again the financial guarantor of the responsible person.

134. Under the 1990 German Environmental Liability Act, the "owner" of the "facilities" which have caused damage is strictly liable. 153/

135. In international law, with a very few exceptions, operators are held liable for the damage their activities cause. This is particularly evident in treaty practice.

1. Treaty practice

136. The operator of activities causing extraterritorial damage or the insurer of the operator may be liable for damage. This is standard practice in conventions primarily concerned with commercial activities, such as the 1966 Additional Convention to the 1961 International Convention Concerning the Carriage of Passengers and Luggage by Rail (CIV) of 25 February 1961 relating to the liability of the railway for death of and personal injury to passengers. Article 2 of the Convention reads in part:

> "1. The railway shall be liable for damage resulting from the death of, or personal injury or any other bodily or mental harm to, a passenger, caused by an accident arising out of the operation of the railway and happening while the passenger is in, entering or alighting from a train.
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> ....
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> 6. For the purposes of this Convention, the 'responsible railway' is that which, according to the list of lines provided for

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151/ 42 U.S.C.A. Section 9607(A).

152/ 42 U.S.C.A. Section 9601(2)(A).

153/ See article 1 of the Act, in W.C. Hoffman, op cit, p. 32.

in article 59 of CIV, operates the line on which the accident occurs. If, in accordance with the aforementioned list, there is joint operation of the line by two railways, each of them shall be liable."

137. The operators of railways may be private entities or Government agencies. The Convention makes no distinction between them as far as liability and compensation are concerned.

138. Similarly, the 1952 Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface provides for the liability of the operator of an aircraft causing injury to a person on the surface. 154/

154/ The relevant articles of the Convention read:

"PRINCIPLES OF LIABILITY

Article 1

1. Any person who suffers damage on the surface shall, upon proof only that the damage was caused by an aircraft in flight or by any person or thing falling therefrom, be entitled to compensation as provided by this Convention.

...

Article 2

...

2. (a) For the purpose of this Convention the term "operator" shall mean the person who was making use of the aircraft at the time the damage was caused, provided that if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, whether directly or indirectly, that person shall be considered the operator.

(b) A person shall be considered to be making use of an aircraft when he is using it personally or when his servants or agents are using the aircraft in the course of their employment, whether or not within the scope of their authority.

3. The registered owner of the aircraft shall be presumed to be the operator and shall be liable as such unless, in the proceedings for the determination of his liability, he proves that some other person was the operator and, in so far as legal procedures permit, takes appropriate measures to make that other person a party in the proceedings.

Article 3

If the person who was the operator at the time the damage was caused had not the exclusive right to use the aircraft for a period of more than fourteen days, dating from the moment when the right

139. The operators of aircraft may also be private or Government entities. Under article 11, the operators enjoy limitation on liability. However, the operators do not enjoy limitation on liability if the injury was due to their negligence. 155/ In some circumstances, liability can be imputed to the insurer of the aircraft. 156/

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to use commenced, the person from whom such right was derived shall be liable jointly and severally with the operator, each of them being bound under the provisions and within the limits of liability of this Convention.

Article 4

If a person makes use of an aircraft without the consent of the person entitled to its navigational control, the latter, unless he proves that he has exercised due care to prevent such use, shall be jointly and severally liable with the unlawful user for damage giving a right to compensation under article 1, each of them being bound under the provisions and within the limits of liability of this Convention."

155/ Article 12 reads:

"1. If the person who suffers damage proves that it was caused by a deliberate act or omission of the operator, his servants or agents, done with intent to cause damage, the liability of the operator shall be unlimited; provided that in the case of such act or omission of such servant or agent, it is also proved that he was acting in the course of his employment and within the scope of his authority.

2. If a person wrongfully takes and makes use of an aircraft without the consent of the person entitled to use it, his liability shall be unlimited."

156/ The relevant paragraphs of article 16 read:

"5. Without prejudice to any right of direct action which he may have under the law governing the contract of insurance or guarantee, the person suffering damage may bring a direct action against the insurer or guarantor only in the following cases:

(a) where the security is continued in force under the provisions of paragraph 1 (a) and (b) of this article;

(b) the bankruptcy of the operator.

6. Excepting the defence specified in paragraph 1 of this article, the insurer or other person providing security may not, with respect to direct actions brought by the person suffering damage based upon application of this Convention, avail himself of any grounds of nullity or any right of retroactive cancellation.

7. The provisions of this article shall not prejudice the question whether the insurer or guarantor has a right of recourse against any other person."

140. The 1969 Convention on Oil Pollution Damage provides for a regime of strict liability of the ship owner. Paragraph 1 of Article 3 provides:

> "1. Except as provided in paragraphs 2 and 3 of this Article, the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident."

141. However, in accordance with paragraph 2 of article 5, if the incident occurred as a result of "the actual fault or privity of the owner, he shall not be entitled to avail himself of the limitation" of liability.

142. Concerns were voiced at the 1969 Conference regarding whether the ship owner or the cargo owner or both should bear the costs of strict liability. 157/ The final agreement, holding the ship owner strictly liable, was secured by agreeing to adopt another convention to (a) ensure adequate compensation for the victim and (b) distribute the burden of liability by indemnifying the ship owners against part of the liability. This arrangement lead to the adoption of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 18 December 1971. 158/ The preamble to the Convention sets out the two principal goals mentioned above:

> "Considering however that this regime does not afford full compensation for victims of oil pollution damage in all cases while it imposes an additional financial burden on shipowners,
>
> Considering further that the economic consequences of oil pollution damage resulting from the escape or discharge of oil carried in bulk at sea by ships should not exclusively be borne by the shipping industry but should in part be borne by the oil cargo interests,
>
> Convinced of the need to elaborate a compensation and indemnification system supplementary to the International Convention on Civil Liability for Oil Pollution Damage with a view to ensuring that full compensation will be available to victims of oil pollution incidents and that the shipowners are at the same time given relief in respect of the additional financial burdens imposed on them by the said Convention.
>
> ..."

143. The 1971 Convention established an international fund for the compensation of pollution damage, the International Oil Pollution Compensation Fund or the "IOPC Fund". In 1984 a Protocol to the 1969 Convention was

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157/ See LEG/CONF/C.2/SR.2-13, cited in Abecassis and Jarashow, p. 253, note 1.

158/ Int'l L. Mat., vol. 11, p. 284.

adopted setting up also an IOPC Fund to compensate the victims. The 1984 Protocol is not concerned with distribution of liability and relief for ship owners because of the substantial rise in the limits. The 1984 Protocol deletes all references to ship owners indemnification.

144. Article 2 (3) of the 1984 Protocol expands the scope of "incident" as defined in article 1(8) of the 1969 Convention to include the situation in which there is a threat to pollution. The new definition reads:

> "'incident' means any occurrence, or series of occurrences having the same origin, which causes pollution damage or creates a grave and imminent threat of causing such damage." 159/

145. The very first civil liability convention on nuclear material is the Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960. 160/ This Convention was drafted by the OECD to be applicable within Western European States. The preamble of the Convention states, as its purposes, providing adequate compensation for the victims of nuclear damage and unifying the laws related to nuclear damage in the States parties.

146. This Convention provides for the absolute but limited liability of the operator of a nuclear installation. It is considered one of the more successful conventions in the nuclear area because of the high number of ratifications by the European nuclear States. It was amended in 1963, to increase the amount of the limitation of liability which had proved inadequate under the 1960 Convention. 161/

147. A comparable regime was provided in the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 at the global level. While the 1960 Convention does not directly refer to the concept of absolute liability, the Vienna Convention of 1963 makes an explicit reference to that concept in article IV where it states that "The liability of the operator for nuclear damage under this Convention shall be absolute". 162/ This Convention also provides for limitation of liability.

148. The 1962 Convention on the Liability of Operators of Nuclear Ships also provides for absolute liability of the operator of nuclear ships. 163/

159/ Ibid., emphasis added.

160/ See AJIL, vol. 55, p. 1082, 1961 or United Kingdom Treaty Series, vol. 69, 1968, Cmnd. 3755.

161/ See Convention Supplementary to the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy of 31 January 1963, in Int'l Legal Mat vol. 2, 1963, p. 685 or in United Kingdom Treaty Series, vol. 44, 1975, Cmnd 5948.

162/ Emphasis added.

163/ Article II of the Convention reads:

> "1. The operator of a nuclear ship shall be absolutely liable for any nuclear damage upon proof that such damage has been caused by a

There is also a convention which set a civil liability regime in respect of nuclear ships. 164/

149. The Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material was adopted on 17 December 1971 to provide for civil liability of the operator of a nuclear installation for damage caused by a nuclear incident occurring in the course of the maritime carriage of nuclear material. 165/

150. In addition to providing for equitable compensation for the victims of nuclear damage, the above four treaties in the field of nuclear damage harmonize important aspects of liability in that area in national laws. They provide for: (1) absolute liability of the operator of the nuclear installation, meaning that the proof of causation suffices for attribution of liability; (2) limitation of liability of the operator; and (3) guaranteed payment of compensation by compulsory insurance. The Convention Supplementary to the Paris Convention also provides for additional public funds to guarantee compensation. 166/ Other conventions do not contain such a requirement.

151. Under the nuclear civil liability conventions, States are given considerable discretion to adopt in their domestic law different ceilings on the amount of liability, insurance arrangements, definitions for nuclear damage or to continue to hold operators liable in cases of grave natural disasters. 167/ Germany and Austria have reserved the right to exclude article 9 on defense against liability under the 1960 Convention on Third Party Liability in the Field of Nuclear Energy, thus making liability absolute. 168/

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nuclear incident involving the nuclear fuel of, or radioactive products or waste produced in, such ship.

"2. Except as otherwise provided in this Convention no person other than the operator shall be liable for such nuclear damage."

164/ Convention on the Liability of Operators of Nuclear Ships of 1962, in AJIL, vol. 57, p. 268. For writings on this Convention, see Szasz, Journal of Maritime Law and Commerce, vol. 2, 1970, p. 541; and Cigoj, in ICLQ, vol. 14, 1965.

165/ For the Convention see Cmnd 5094.

166/ See paragraph (b) (ii) and (iii) of article 3 and see also the 1964 and 1982 Additional Protocols to the Convention.

167/ See article 4 (3) (b) of the Vienna Convention of Civil Liability for Nuclear Damage and article 9 of the 1960 Convention on Third Party Liability in the Field of Nuclear Damage.

168/ Reported in Birnie and Boyle, International Law and the Environment, p. 373, note 187.

152. Currently the Standing Committee on Liability for Nuclear Damage is attempting to draft a new convention on transboundary nuclear damage. Issues such as supplementary funds for such damage are under consideration. 169/

153. Under articles 6 and 7 of the Convention on Civil Liability for Damage Resulting From Activities Dangerous to the Environment, the operator is strictly liable. It is indicated in the preamble, that the Convention is based on the "polluter-pays principle". If there is more than one operator, they shall be jointly and severally liable in accordance with article 6. 170/ The Convention defines operator in article 2(6) as "any person who exercises the control of a dangerous activity". And "person" is defined in paragraph 7 of article 2 as "any individual or partnership or any body governed by public or private law, whether corporate or not, including a State or any of its constituent subdivisions".

154. Under article 8 of the Convention on the Regulation of Antarctic Mineral Resource Activities, the primary liability lies with the operator. The Sponsoring State remains liable if (1) it has failed to comply with its obligations under the Convention, and (2) if full compensation cannot be provided through liable operator or otherwise.

155. Under the CRTD the carrier is liable. The element of "control" appears in the definition of "carrier". Paragraph 8 of article 1 defines "carrier" with respect to inland navigation vessel as "the person who at the time of the incident controls the use of the vehicle on board which the dangerous goods

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169/ For the latest version of the Work of the Standing Committee see, IAEA, SCNL/10/INF.4 of 18 November 1994.

170/ Relevant part of article 6 of the Convention reads as follows:

> "2. If an incident consists of a continuous occurrence, all operators successively exercising the control of the dangerous activity during that occurrence shall be jointly and severally liable. However, the operator who proves that the occurrence during the period when he was exercising the control of the dangerous activity caused only a part of the damage shall be liable for that part of the damage only.
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> 3. If an incident consists of a series of occurrences having the same origin, the operators at the time of any such occurrence shall be jointly and severally liable. However, the operator who proves that the occurrence at the time when he was exercising the control of the dangerous activity caused only a part of the damage shall be liable for that part of the damage only.
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> 4. If the damage resulting from a dangerous activity becomes known after all such dangerous activity in the installation or on the site has ceased, the last operator of this activity shall be liable for that damage unless he or the person who suffered damage proves that all or part of the damage resulted from an incident which occurred at a time before he became the operator. If it is so proved, the provisions of paragraphs 1 to 3 shall apply."

are carried". Under this paragraph, the person in whose name the vehicle is registered in a public register or, in the absence of such registration, the owner of the vehicle shall be presumed to control the use of the vehicle unless he proves that another person controls the use of the vehicle and he discloses the identity of such a person. With respect to carriage by rail, the person or persons operating the railway line are considered the "carrier". The 1995 draft convention on Liability and Compensation in Connection with the Carriage of Noxious and Hazardous Substances by Sea, prepared by IMO (HNS) has adopted a combination of this definition and that provided in the International Convention on Civil Liability for Oil Pollution Damage for the "owner" who is responsible under the draft convention.

156. HNS provides in article 4 for the liability of the owner of the ship carrying hazardous substances. 171/

157. Article 4 of the draft protocol to the Basel Convention provides various alternatives regarding the liable party. While the first two alternatives enumerate individuals such as the generator, the exporter, the disposer, the broker, etc., the third alternative holds liable any person who had operational control of the waste at the time of the incident.

2. Judicial decisions and State practice outside treaties

158. No clear picture of the liability of the operator can be derived from judicial decisions or official correspondence. These sources indicate no instances where the operator has been held to be solely liable for payment of compensation for injuries resulting from his activities. In the case of some incidents, private operators have voluntarily paid compensation and taken unilateral action to minimize or prevent injuries, but without admitting liability. It is obviously difficult to determine the real reason for the unilateral and voluntary action. But it cannot be entirely assumed that this action was taken solely on "moral" grounds. The factors of pressure from the home Government, public opinion, or the necessity of a relaxed atmosphere for doing business, should not be underestimated. All these pressures may lead to the creation of an expectation which is stronger than a mere moral obligation.

159. In 1972, the World Bond, a tanker registered in Liberia, leaked 12,000 gallons of crude oil into the sea while unloading at the refinery of the Atlantic Richfield Corporation, at Cherry Point, in the State of Washington. The oil spread to Canadian waters and fouled five miles of beaches in British Columbia. The spill was relatively small, but it had major political repercussions. Prompt action was taken both by the refinery and by the authorities on either side of the frontier to contain and limit the damage, so that the injury to Canadian waters and shorelines could be minimized. The cost of the clean-up operations was borne by the private operator, the Atlantic Petroleum Corporation. 172/

171/ IMO document LEG 72/4/Corr.1, of 3 March 1995.

172/ See The Canadian Yearbook of International Law 1973 (Vancouver), vol. XI, pp. 333-334.

160. In the case of the transfrontier pollution caused by the activities of the Peyton Packing Company and the Casuco Company, action was taken unilaterally by those two United States companies to remedy the injury. Similarly, in the Trail Smelter case, the Canadian operator, the Consolidated Mining and Smelting Company, acted unilaterally to repair the damage caused by the plant's activities in the State of Washington. On the other hand, in the case of an oil prospecting project contemplated by a private Canadian corporation in the Beaufort Sea, near the Alaskan border, the Canadian Government undertook to ensure compensation for any damage that might be caused in the United States in the event that the guarantees furnished by the corporation proved insufficient.

C. STATE LIABILITY

161. Past trends demonstrate that States have been held liable for injuries caused to other States and their nationals as a result of activities occurring within their territorial jurisdiction or under their control. Even treaties imposing liability on the operators of activities have not in all cases exempted States from liability. This type of State accountability is a hybrid between State responsibility and liability (see para. 81).

1. Treaty practice

162. In some multilateral treaties, States have agreed to be held liable for injuries caused by activities occurring within their territorial jurisdiction or under their control. Some conventions regulating activities undertaken mostly by private operators impose certain obligations upon the State to ensure that its operators abide by those regulations. If the State fails to do so, it is held liable for the injuries the operator causes. For example, under paragraph 2 of article III of the 1962 Convention on the Liability of Operators of Nuclear Ships, the operator is required to maintain insurance or other financial security covering his liability for nuclear damage in such forms as the licensing State specifies. Furthermore, the licensing State has to ensure the payment of claims for compensation for nuclear damage established against the operator by providing the necessary funds up to the limit laid down in paragraph 1 of article III, to the extent that the yield of the insurance of the financial security is inadequate to satisfy such claims. Hence the licensing State is obliged to ensure that the insurance of the operator or the owner of the nuclear ship satisfies the requirements of the Convention. Otherwise the State itself is liable and has to pay compensation. In addition, under article X of the Convention, the State is required to take all necessary measures to prevent a nuclear ship flying its flag from operating without a licence. If a State fails to do so, and a nuclear ship flying its flag causes injury to others, the flag State is considered to be the licensing State, and it will be held liable for compensation to victims in accordance with the obligations laid down in article III. 173/

173/ Article X of the Convention reads:

"1. Each Contracting State undertakes to take all measures necessary to prevent a nuclear ship flying its flag from being operated without a licence or authority granted by it.

163. Under paragraph 2 of article 8 of the Convention on the Regulation of Antarctic Mineral Resource Activities, 174/ an operator is strictly liable for:

(a) damage to the Antarctic environment or dependent or associated ecosystems ... ;

(b) loss of or impairment to an established use, ...;

(c) loss or damage to property of a third party or loss of life or personal injury of a third party arising directly out of damage described in subparagraph (a) above; and

(d) reimbursement of reasonable costs by whomsoever incurred relating to necessary response action, ...

164. Paragraph 3 of article 8 provides that damage of the kind referred to in paragraph 2 which would not have occurred or continued if the Sponsoring State had carried out its obligations under this Convention with respect to its operator shall, in accordance with international law, entail liability which will be limited to that portion of liability not satisfied by the operator or otherwise.

165. Article 9 of the draft protocol to the Basel Convention provides for State liability for the payment of compensation to the extent that compensation for damage under the civil liability regime and/or the Fund regime is inadequate or not available.

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2. In the event of nuclear damage involving the nuclear fuel of, or radioactive products or waste produced in, a nuclear ship flying the flag of a Contracting State, the operation of which was not at the time of the nuclear incident licensed or authorized by such Contracting State, the owner of the nuclear ship at the time of the nuclear incident shall be deemed to be the operator of the nuclear ship for all the purposes of this Convention, except that his liability shall not be limited in amount.

3. In such an event, the Contracting State whose flag the nuclear ship flies shall be deemed to be the licensing State for all the purposes of this Convention and shall, in particular, be liable for compensation for victims in accordance with the obligations imposed on a licensing State by article III and up to the limit laid down therein.

4. Each Contracting State undertakes not to grant a licence or other authority to operate a nuclear ship flying the flag of another State. However, nothing in this paragraph shall prevent a Contracting State from implementing the requirements of its national law concerning the operation of a nuclear ship within its internal waters and territorial sea."

174/ For the Convention see, Int'l L. M., vol. 28, p. 868.

166. For activities involving primarily States, the States themselves have accepted liability. Such is the case under the 1972 Convention on International Liability for Damage Caused by Space Objects. Article II of the Convention provides for the absolute liability of the launching State for damage caused by its space object:

> "A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight."

167. In the event of an accident involving two space objects and causing injury to a third State or its nationals, both launching States are liable to the third State, as provided in article IV. 175/

168. Furthermore, article V provides that, when two or more States jointly launch a space object, they are both jointly and severally liable for any damage the space object may cause. 176/

175/ Article IV reads:

> "1. In the event of damage being caused elsewhere than on the surface of the earth to a space object of one launching State or to persons or property on board such a space object by a space object of another launching State, and of damage thereby being caused to a third State or to its natural or juridical persons, the first two States shall be jointly and severally liable to the third State, to the extent indicated by the following:
>
> (a) If the damage has been caused to the third State on the surface of the earth or to aircraft in flight, their liability to the third State shall be absolute;
>
> (b) If the damage has been caused to a space object of the third State or to persons or property on board, that space object elsewhere than on the surface of the earth, their liability to the third State shall be based on the fault of either of the first two States or on the fault of persons for whom either is responsible.
>
> 2. In all cases of joint and several liability referred to in paragraph 1 of this article, the burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault: if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them. Such apportionment shall be without prejudice to the right of the third State to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable."

176/ Relevant paragraphs of article V read:

> "1. Whenever two or more States jointly launch a space object, they shall be jointly and severally liable for any damage caused.

169. Paragraphs 1 and 2 of article XXII provide that, if the launching entity is an international organization, it has the same liability as a launching State.

170. Article XXII further provides, in paragraphs 3 and 4, that, independently of the launching international organization, those of its members that are parties to the Convention are also jointly and severally liable. 177/

171. Finally, the 1982 United Nations Convention on the Law of the Sea provides in article 139 that States Parties to the Convention shall ensure that activities in the Area, whether carried out by the State or its nationals, are in conformity with the Convention. When a State Party fails to carry out its obligation, it will be liable for damage. The same liability is imposed upon an international organization for activities in the Area. In this case, States members of international organizations acting together bear joint and several liability. States members of international organizations

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2. A launching State which has paid compensation for damage shall have the right to present a claim for indemnification to other participants in the joint launching. The participants in a joint launching may conclude agreement regarding the apportioning among themselves of the financial obligation in respect of which they are jointly and severally liable. Such agreements shall be without prejudice to the right of a State sustaining damage to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable.

3. A State from whose territory or facility a space object is launched shall be regarded as a participant in a joint launching."

177/ Relevant paragraphs of article XXII reads:

"3. If an international intergovernmental organization is liable for damage by virtue of the provisions of this Convention, that organization and those of its members which are States Parties to this Convention shall be jointly and severally liable; provided, however, that:

(a) any claim for compensation in respect of such damage shall be first presented to the organization;

(b) only where the organization has not paid, within a period of six months, any sum agreed or determined to be due as compensation for such damage, may the claimant State invoke the liability of the members which are States Parties to this Convention for the payment of that sum.

4. Any claim, pursuant to the provision of this Convention, for compensation is respect of damage caused to an organization which has made a declaration in accordance with paragraph 1 of this article shall be presented by a State member of the organization which is a State Party to this Convention."

involved in activities in the Area must ensure the implementation of the requirements of the Convention with respect to those international organizations. 178/

172. Similarly, article 263 of the Convention provides that States and international organizations shall be liable for damage caused by pollution of the marine environment arising out of marine scientific research undertaken by them or on their behalf.

2. Judicial decisions and State practice outside treaties

173. Judicial decisions, official correspondence and inter-State relations show that, in certain circumstances, States are held accountable for the private activities conducted within their territorial jurisdiction and for the activities they themselves conduct within or beyond the limits of their territorial border. Even when States have refused to accept liability as a legal principle, they have nevertheless acted as though they accepted such liability, whatever the terms used to describe their position. Most of the cases and incidents examined in this section relate to activities conducted by States.

174. In its judgment of 9 April 1949 in the Corfu Channel case, the International Court of Justice imposed liability upon Albania for failure to notify British shipping of a dangerous situation in its territorial waters, whether or not that situation had been caused by the Government of Albania. The Court found that it was the obligation of Albania to notify, for the

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178/ Article 139 of the Convention reads:

"1. States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or State enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this part. The same responsibility applies to international organizations for activities in the Area carried out by such organizations.

2. Without prejudice to the rules of international law and Annex III, article 22, damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability; States Parties or international organizations acting together shall bear joint and several liability. A State Party shall not however be liable for damage caused by any failure to comply with this part by a person whom it has sponsored under article 153, paragraph 2 (b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and annex III, article 4, paragraph 4.

3. States Parties that are members of international organizations shall take appropriate measures to ensure the implementation of this article with respect to such organizations."

benefit of shipping in general, the existence of mines in its territorial waters, not only by virtue of The Hague Convention No. VIII of 1907, but also of "certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war, . . ., and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States". 179/ The Court found that no attempt had been made by Albania to prevent the disaster and it therefore held Albania "responsible under international law for the explosions . . . and for the damage and loss of human life ...". 180/

175. In its claim against the USSR in 1979 following the accidental crash on Canadian territory of the nuclear-powered Soviet satellite, Cosmos 954, Canada sought to impose "absolute liability" on the Soviet Union by reason of the damage caused by the accident. In arguing the liability of the Soviet Union, Canada invoked not only "relevant international agreements", including the 1972 Convention on International Liability for Damage caused by Space Objects, but also "general principles of international law".

176. In connection with the construction of a highway in Mexico, in proximity to the United States border, the United States Government, considering that, notwithstanding the technical changes that had been made in the project at its request, the highway did not offer sufficient guarantees for the security of property situated in United States territory, reserved its rights in the event of damage resulting from the construction of the highway. In a note addressed on 29 July 1959 to the Mexican Minister of Foreign Relations, the United States Ambassador to Mexico concluded:

> "In view of the foregoing, I am instructed to reserve all the rights that the United States may have under international law in the event that damage in the United States results from the construction of the highway." 181/

177. In the case of the Rose Street Canal, both the United States and Mexico reserved the right to invoke the accountability of the State whose construction activities might cause damage in the territory of the other State.

178. In the correspondence between Canada and the United States regarding the United States Cannikin underground nuclear tests on Amchitka, Canada reserved its rights to compensation in the event of damage.

179. The series of United States nuclear tests on Eniwetok Atoll on 1 March 1954 caused injuries extending far beyond the danger area: they injured Japanese fishermen on the high seas and contaminated a great part of the atmosphere and a considerable quantity of fish, thus seriously disrupting the Japanese fish market. Japan demanded compensation. In a note dated 4 January 1955, the United States Government, completely avoiding any

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179/ I.C.J. Reports 1949, p. 22.

180/ Ibid., p. 36. For diverse views as regards whether this judgement establishes strict liability for States, see paragraphs 96 and 97 of this Study.

181/ Whiteman, op. cit., vol. 6, p. 262.

reference to legal liability, agreed to pay compensation for injury caused by the tests:

> "... The Government of the United States of America has made clear that it is prepared to make monetary compensation as an additional expression of its concern and regret over the injuries sustained ... ... the United States of America hereby tenders, ex gratia, to the Government of Japan, without reference to the question of legal liability, the sum of two million dollars for purposes of compensation for the injuries or damages sustained as a result of nuclear tests in the Marshall Islands in 1954.
>
> . . .
>
> It is the understanding of the Government of the United States of America that the Government of Japan, in accepting the tendered sum of two million of dollars, does so in full settlement of any and all claims against the United States of America or its agents, nationals or juridical entities for any and all injuries, losses or damages arising out of the said nuclear tests." 182/

180. In the case of the injuries sustained in 1954 by the inhabitants of the Marshall Islands, then a Trust Territory administered by the United States, the latter agreed to pay compensation. A report of the Committee on Interior and Insular Affairs of the United States Senate stated that, owing to an unexpected wind shift immediately following the nuclear explosion, the 82 inhabitants of the Rongelap Atoll had been exposed to heavy radioactive fallout. After describing the injuries to persons and property suffered by the inhabitants and the immediate and extensive medical assistance provided by the United States, the report concluded: "It cannot be said, however, that the compensatory measures heretofore taken are fully adequate . . .". The report disclosed that in February 1960 a complaint against the United States had been lodged with the high court of the Trust Territory with a view to obtaining $8,500,000 as compensation for property damage, radiation sickness, burns, physical and mental agony, loss of consortium and medical expenses. The suit had been dismissed for lack of jurisdiction. The report indicated, however, that bill No. 1988 (on payment of compensation) presented in the House of Representatives was "needed to permit the United States to do justice to these people". On 22 August 1964, President Johnson signed into law an act under which the United States assumed "compassionate responsibility" to compensate inhabitants of the Rongelap Atoll, in the Trust Territory of the Pacific Islands, for radiation exposures sustained by them as a result of a thermonuclear detonation at Bikini Atoll in the Marshall Islands on 1 March 1954" and authorized $950,000 to be paid in equal amounts to the affected inhabitants of Rongelap. 183/ According to another report, in June 1982 the Reagan Administration was prepared to pay $100 million to the Government of the Marshall Islands in settlement of all claims against the

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182/ The Department of State Bulletin, Washington, D.C., vol. 32, No. 812, 17 January 1955, pp. 90-91.

183/ Whiteman, op. cit., vol. 4, p. 567.

United States by islanders whose health and property had been affected by United States nuclear weapons tests in the Pacific between 1946 and 1963. 184/

181. The arbitral award rendered on 27 September 1968 in the Gut Dam case also bears on State liability. In 1874, a Canadian engineer had proposed to his Government the construction of a dam between Adam Islands, in Canadian territory, and Les Galops Island, in the United States, in order to improve navigation on the St. Lawrence River. Following investigations and the exchange of many reports, as well as the adoption of legislation by the United States Congress approving the project, the Canadian Government undertook the construction of the dam in 1903. However, it soon became clear that the dam was too low to serve the desired purposes and, with United States permission, Canada increased its height. Between 1904 and 1951, several man-made changes affected the flow of water in the Great Lakes-St. Lawrence River Basin. While the dam itself was not altered in any way, the level of the waters in the river and in nearby Lake Ontario increased. In 1951-1952, the waters reached unprecedented levels which, in combination with storms and other natural phenomena, resulted in extensive flooding and erosion, causing injuries on both the north and south shores of the lakes. In 1953, Canada removed the dam as part of the construction of the St. Lawrence Seaway, but the United States claims for damages allegedly resulting from the presence of the Gut Dam continued to fester for some years. 185/

182. The Lake Ontario Claims Tribunal, established in 1965 to resolve the matter, recognized the liability of Canada, without finding any fault or negligence on the part of Canada. The Tribunal, of course, relied a great deal on the terms of the second condition stipulated in the instrument signed on 18 August 1903 and 10 October 1904, whereby the United States Secretary of War had approved construction of the dam, as well as on Canada's unilateral acceptance of liability. Furthermore, the Tribunal found Canada liable not only towards the inhabitants of Les Galops in connection with the injuries caused by the dam, but also towards all United States citizens. Such responsibility was, moreover, found not to be limited in time to some initial testing period. The Tribunal concluded that the only questions remaining to be settled were whether the Gut Dam had caused the damage for which claims had been filed and the amount of compensation.

183. Other transboundary incidents have occurred owing to activities carried out by Governments within their territories, with effects on a neighbouring State, but they have not given rise to official demands for compensation. These incidents have of course been minor and of an accidental nature.

184. In 1949, Austria made a formal protest to the Hungarian Government for installing mines in its territory close to the Austrian border, and demanded their removal, but it did not claim compensation for injuries caused by the explosion of some of the mines on its territory. Hungary had apparently laid

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184/ International Herald Tribune, 15 June 1982, p. 5, col. 2.

185/ See the report of the United States agent before the Lake Ontario Claims Tribunals, "Canada-United States Settlement of Gut Dam Claims (27 September 1968)", International Legal Materials (Washington, D.C.), vol. VIII, 1969, pp. 128-138.

the mines to prevent illegal passage across the border. Austria was concerned that during a flood the mines might be washed into Austrian territory and endanger the lives of its nationals resident near the border. These protests, however, did not prevent Hungary from maintaining its minefields. In 1966, a Hungarian mine exploded in Austrian territory, causing extensive damage. The Austrian Ambassador lodged a strong protest with the Hungarian Foreign Ministry, accusing Hungary of violating the uncontested international legal principle according to which measures taken in the territory of one State must not endanger the lives, health and property of citizens of another State. Following a second accident, occurring shortly after, Austria again protested to Hungary, stating that the absence of a public commitment by Hungary to take all measures to prevent such accidents in the future was totally inconsistent with the principle of "good neighbourliness". Hungary subsequently removed or relocated all minefields away from the Austrian border. 186/

185. In October 1968, during a shooting exercise, a Swiss artillery unit erroneously fired four shells into the territory of Liechtenstein. The facts concerning this incident are difficult to ascertain. However, the Swiss Government, in a note to the Government of Liechtenstein, expressed regret for the involuntary violation of the frontier. The Swiss Government stated that it was prepared to compensate all damage caused and that it would take all necessary measures to prevent a recurrence of such incidents. 187/

186. Judicial decisions and official correspondence demonstrate that States have agreed to assume liability for the injurious impact of activities by private entities operating within their territory. The legal basis for such State liability appears to derive from the principle of territorial sovereignty, a concept investing States with exclusive rights within certain portions of the globe. This concept of the function of territorial sovereignty was emphasized in the Island of Palmas case. 188/ The arbitrator in that case stated that territorial sovereignty:

> ". . . cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian." 189/

187. This concept was later formulated in a more realistic way, namely, that actual physical control is the sound basis for State liability and responsibility. The International Court of Justice, in its advisory opinion of 21 June 1971 concerning Namibia, stated:

186/ See Handl, loc. cit, pp. 23-24.

187/ Annuaire suisse de droit international, 1969-1970, Zurich, vol. 26, p. 158.

188/ Netherlands v. United States of America, United Nations, Reports of International Arbitral Awards, vol. II, p. 829.

189/ Ibid., p. 839.

". . . Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States." 190/

188. From this perspective, the liability of States for extraterritorial damage caused by private persons under their control is an important issue to be examined in the context of this Study. The following are examples of State practice touching upon this source of State liability.

189. In 1948, a munitions factory in Arcisate, in Italy, near the Swiss frontier, exploded and caused varying degrees of damage in several Swiss communes. The Swiss Government demanded reparation from the Italian Government for the damage sustained; it invoked the principle of good neighbourliness and argued that Italy was liable since it tolerated the existence of an explosives factory, with all its attendant hazards, in the immediate vicinity of an international border. 191/

190. In 1956, the River Mura, forming the international boundary between the former Yugoslavia and Austria, was extensively polluted by the sediments and mud which several Austrian hydroelectric facilities had released by partially draining their reservoirs in order to forestall major flooding. The former Yugoslavia claimed compensation for the economic loss incurred by two paper mills and for damage to fisheries. In 1959, the two States agreed on a settlement, pursuant to which Austria paid monetary compensation and delivered a certain quantity of paper to the former Yugoslavia. 192/ Although the settlement was reached in the framework of the Permanent Austro-Yugoslavian Commission for the River Mura, this is a case in which the injured State invoked the direct liability of the controlling State and the controlling State accepted the claim to pay compensation.

191. In 1971, the Liberian tanker Juliana ran aground and split apart off Niiagata, on the west coast of the Japanese island of Honshu. The oil of the tanker washed ashore and extensively damaged local fisheries. The Liberian Government (the flag State) offered 200 million yen to the fishermen for damage, which they accepted. 193/ In this affair, the Liberian Government

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190/ Legal Consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), advisory opinion, I.C.J. Reports 1971, p. 54, para. 118 (a).

191/ Guggenheim, loc. cit., p. 169.

192/ See Handl, "State liability for accidental transnational environmental damage by private persons", American Journal of International Law, vol. 74, 1980, pp. 545-546; The Times, London, 2 December 1971, p. 8, col. 1.

193/ The Times, London, 1 October 1974; Revue générale de droit international public, Paris, vol. 80, 1975, p. 842.

accepted the claims for damage caused by the act of a private person. It seems that no allegations of wrongdoing on the part of Liberia were made at an official diplomatic level.

192. Following the accidental spill of 12,000 gallons of crude oil into the sea at Cherry Point, in the State of Washington, and the resultant pollution of Canadian beaches, the Canadian Government addressed a note to the United States Department of State in which it expressed its grave concern about this "ominous incident" and noted that "the Government wishes to obtain firm assurances that full compensation for all damages, as well as the cost of clean-up operations, will be paid by those legally responsible". 194/ Reviewing the legal implications of the incident before the Canadian Parliament, the Canadian Secretary of State for External Affairs stated:

> "We are especially concerned to ensure observance of the principle established in the 1938 Trail Smelter arbitration between Canada and the United States. This has established that one country may not permit the use of its territory in such a manner as to cause injury to the territory of another and shall be responsible to pay compensation for any injury so suffered. Canada accepted this responsibility in the Trail Smelter case and we would expect that the same principle would be implemented in the present situation. Indeed, this principle has already received acceptance by a considerable number of States and hopefully it will be adopted at the Stockholm Conference as a fundamental rule of international environmental law." 195/

193. Canada, referring to the precedent of the Trail Smelter case, claimed that the United States was responsible for the extraterritorial damage caused by acts occurring under its territorial control, regardless of whether the United States was at fault. The final resolution of the dispute did not involve the legal principle invoked by Canada; the private company responsible for the pollution offered to pay the costs of the clean-up operations; the official United States response to the Canadian claim remains unclear.

194. In 1973, a major contamination occurred in the Swiss canton of Bâle-Ville owing to the production of insecticides by a French chemical factory across the border. The contamination caused damage to the agriculture and environment of that canton and destroyed some 10,000 litres of milk production per month. 196/ The facts about the case and the diplomatic negotiations that followed are difficult to ascertain. The Swiss Government apparently intervened and negotiated with the French authorities in order to halt the pollution and obtain compensation for the damage. The reaction of the French authorities is unclear; it appears, however, that persons injured brought charges in French courts.

194/ Loc. cit.

195/ Ibid., p. 334.

196/ See Annuaire suisse de droit international, 1974, Zurich, vol. 30, p. 147.

195. During negotiations between the United States and Canada regarding a plan for oil prospecting in the Beaufort Sea, near the Alaskan border, the Canadian Government undertook to guarantee payment of any damage that might be caused in the United States by the activities of the private corporation that was to undertake the prospecting. Although the private corporation was to furnish a bond covering compensation for potential victims in the United States, the Canadian Government accepted liability on a subsidiary basis for payment of the cost of transfrontier damage should the bonding arrangement prove to be inadequate.

CHAPTER III. EXONERATION FROM LIABILITY

196. In domestic laws, some grounds for exoneration from liability have been anticipated. For example, in the United States, subsection 2703(a) of OPA provides for "complete defence", meaning that a responsible party is not liable if it shows by a preponderance of evidence that:

> "The discharge and resulting damage or removal costs were caused solely by:
>
> (1) An act of God;
>
> (2) An act of war;
>
> (3) an act or omission of a third party: other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party ... But a 'third party' defense is available only if the responsible party establishes by a preponderance of the evidence that it:
>
> A. exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances; and
>
> B. took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions.
>
> (4) any combination of the above."

197. In addition, subsection 2702(d)(1)(A), on the liability of third parties provides, that in any case in which a responsible party establishes that a discharge and the resulting removal costs and damages were caused solely by an act or omission of one or more third parties described in section 2703(a)(3), the third party shall be treated as the responsible party for the purposes of determining liability. The third party defence of this provision seems illusory. Under subsection 2702(d)(1)(B)(i) and (ii), the responsible party shall pay damages to the claimant and shall be entitled by subrogation to all rights of the United States Government and the claimant to recover removal costs and damages from the third party.

198. These defence are not available, if, under subsection 2703(c), the responsible party fails or refuses:

> "1. to report the incident as required by law if the responsible party knows or has reasons to know of the incident;
>
> 2. to provide all reasonable cooperation and assistance requested by a responsible official in connection with the removal activities; or
>
> 3. without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 1321 ... or the Intervention on the High Seas Act."

199. Also under subsection 2703(b), a responsible party is not liable to a claimant to the extent that the incident is caused by the gross negligence or wilful misconduct of the claimant. Under subsections 2709 and 2710 of OPA, where a responsible party does not have a complete defence, it may proceed against a third party for contribution in case the discharge was caused, at least in part, by the third party or for indemnity.

200. Similar defences are available under FWPCA, subsection 1321(f). They include:

> "(a) an act of God, (b) an act of war, (c) negligence on the part of the United States Government, or (d) and act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses..."

201. The same defences are provided under CERCLA section 9607(b). They are as follows:

> "(1) An act of God;
>
> (2) An act of war;
>
> (3) An act or omission of a third party other than an employee or agent of the defendant or other than one whose act or omission occurs in connection with a contractual relationship existing directly or indirectly with the defendant, if a defendant establishes that:
>
> (a) He exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances; and
>
> (b) He took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or
>
> (4) Any combination of the above." 197/

202. The ELA of Germany provides for the following grounds for exoneration from liability: (a) damage caused by force majeure (höhere Gewalt); 198/ and (b) if the damage is "only insubstantial" or "reasonable according to the local conditions". 199/ This exclusion applies only if the facility is

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197/ Where an owner or operator has actual knowledge of a release of a hazardous material at the facility and subsequently transfers the property to another person without disclosing that information, the former owner or operator remains liable and cannot invoke the defence under subsection 9607(b)(3). See Robert Force, op. cit.

198/ Section 4 of the Act.

199/ See W. Hoffman, "Germany's new Environmental Liability Act: Strict Liability for Facilities Causing Pollution", in Netherlands International Law Review, vol. 38, 1991, p. 32, note 29.

"operated properly", meaning that it has complied with all the required safety regulations. 200/

203. In inter-State relations as under domestic law, there are certain circumstances in which liability may be ruled out. The principles governing exoneration from liability in inter-State relations are similar to those applying in domestic law, such as contributory negligence, war, civil insurrection, natural disasters of an exceptional character, etc.

A. TREATY PRACTICE

204. Contributory negligence by the injured party is held to extinguish the total or partial liability of the operator or the acting State in some multilateral conventions. Under the 1963 Vienna Convention on Civil Liability for Nuclear Damage, if the injury is caused as a result of the gross negligence of the claimant or an act or omission of such person with intent to cause damage, the competent court may, if its domestic law so provides, relieve the operator wholly or partly from his obligation to pay damage to such person. However, it is the operator who should prove the negligence of the claimant. 201/

205. Paragraph 3 of the same article also provides for exoneration from liability if the injury is caused by a nuclear incident directly due to an act of armed conflict, hostilities, civil war or insurrection. Thus, unless the domestic law of the installation State provides to the contrary, the operator is not liable for nuclear damage caused by a nuclear incident directly due to a grave natural disaster of an exceptional character:

> "3(a) No liability under this Convention shall attach to an operator for nuclear damage caused by a nuclear incident directly due to an act of armed conflict, hostilities, civil war or insurrection.
>
> (b) Except in so far as the law of the Installation State may provide to the contrary, the operator shall not be liable for nuclear damage caused by a nuclear incident directly due to a grave natural disaster of an exceptional character."

200/ See Section 5 of the Act. This exclusion applies only if the facility is "operated properly" meaning that it has complied with all the regulatory instructions and that there has been no interruption of the operation. See ibid.

201/ Paragraph 2 of article IV of the Convention reads:

> "2. If the operator proves that the nuclear damage resulted wholly or partly either from the gross negligence of the person suffering the damage or from an act or omission of such person done with intent to cause damage, the competent court may, if its law so provides, relieve the operator wholly or partly from his obligation to pay compensation in respect of the damage suffered by such person."

206. Under paragraphs 2 and 3 of article 1 of the 1969 International Convention on Civil Liability for Oil Pollution Damage, war, hostilities, civil war, insurrection or natural phenomena of an exceptional, inevitable and irresistible character are elements providing exoneration from liability, independently of negligence on the part of the claimant. Thus, when the damage is wholly caused by the negligence or other wrongful act of any Government or authorities responsible for the maintenance of lights or other navigational aids, the owner is exonerated from liability. Again the burden of proof is on the shipowner. 202/

207. Under the 1972 Convention on International Liability for Damage caused by Space Objects, if the launching State proves that the damage caused to the claimant State has been wholly or partly the result of gross negligence or of an act or omission of the claimant or its nationals with intent to cause damage, it will be exonerated from liability. 203/

208. Under the Additional Convention to CIV, if a passenger suffers injuries due to his own wrongful act or neglect or his behaviour not in conformity with the normal conduct of a passenger, he will have no right of action against the railway. The railway in such cases will be relieved wholly or partially from liability. Article 2, paragraphs 3 and 4, provides:

202/ Paragraphs 2 and 3 of article III of the Convention read:

"2. No liability for pollution damage shall attach to the owner if he proves that the damage:

(a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or

(b) was wholly caused by an act or omission done with the intent to cause damage by a third party, or

(c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

3. If the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the owner may be exonerated wholly or partially from his liability to such person."

203/ Paragraph 1 of article VI of the Convention reads:

"1. Subject to the provisions of paragraph 2 of this article, exoneration from absolute liability shall be granted to the extent that a launching State establishes that the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of a claimant State or of natural or juridical persons it represents."

"3. The railway shall be relieved wholly or partly of liability to the extent that the accident is due to the passenger's wrongful act or neglect or to behaviour on his part not in conformity with the normal conduct of passengers.

4. The railway shall be relieved of liability if the accident is due to a third party's behaviour which the railway, in spite of taking the care required in the particular circumstances of the case, could not avoid and the consequences of which it was unable to prevent."

209. Under the 1952 Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface, if injury is caused solely through the negligence or other wrongful act or omission of the injured person or his servants or agents, the compensation shall be reduced to the extent to which the negligence or other wrongful act contributed to the damage. 204/

210. Under article 3, paragraph 3, and article 7, paragraph 5, of the HNS, if the owner of the ship or the shipper of noxious substances proves that the damage resulted wholly or partially either from an act of omission done with the intent to cause damage by the person who suffered the damage or from the negligence of that person, the owner or the shipper may be exonerated wholly or partially from his liability to such person.

211. Article 3, paragraph 2, of the HNS provides that no liability shall attach to the owner of the ship or the shipper if he proves that the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional and irresistible character, or was wholly caused by an act or omission done with the intent to cause damage by a third party. It was proposed that another subparagraph should be included in the article in which exoneration from liability of the owner or the shipper would be provided for if the damage was wholly caused by negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or

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204/ Article 6 of the Convention reads:

"1. Any person who would otherwise be liable under the provisions of this Convention shall not be liable for damage if he proves that the damage was caused solely through the negligence or other wrongful act of omission of the person who suffers the damage or of the latter's servants or agents. If the person liable proves that the damage was contributed to by the negligence or other wrongful act or omission of the person who suffers the damage, or of his servants or agents, the compensation shall be reduced to the extent to which such negligence or wrongful act or omission contributed to the damage. Nevertheless there shall be no such exoneration or reduction if, in the case of the negligence or other wrongful act or omission of a servant or agent, the person who suffers the damage proves that his servant or agent was acting outside the scope of his authority.

2. When an action is brought by one person to recover damages arising from the death or injury of another person, the negligence or other wrongful act or omission of such other person, or of his servants or agents, shall also have the effect provided in the preceding paragraph."

other navigational aids. There is, however, no indication in the draft convention whether or not the negligent State is liable for damage. Article 3 does not appear to provide for exoneration from liability for damage caused by natural disaster.

212. Article 3 of the 1977 Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources provides that the operator of an installation shall be exonerated from liability if he proves that the damage resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character; if the operator proves that the damage resulted wholly or partly either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, he may be exonerated wholly or partly from his liability to such person. Furthermore, the operator of an abandoned well is not liable for pollution damage if he proves that the incident which caused the damage occurred more than five years after the date on which the well was abandoned under the authority and in accordance with the requirements of the controlling State. If the well has been abandoned in other circumstances, the liability of the operator is governed by the applicable national law. 205/

213. Under CRTD, the carrier shall not be liable if the carrier can prove that "(a) the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or (b) the damage was wholly caused by an act or omission with the intent to cause damage by a third party; or (c) the consignor or any other person failed to meet his obligation to inform him of the dangerous nature of the goods, and that neither he nor his servants or agents knew or ought to have known of their nature."

214. Article 139 of the 1982 United Nations Convention on the Law of the Sea also provides for exoneration from liability of the State for damage caused by any failure of a person whom the State has sponsored to comply with

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205/ Article 3 of the Convention reads in part:

"3. No liability for pollution damage shall attach to the operator if he proves that the damage resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character.

4. No liability for pollution damage shall attach to the operator of an abandoned well if he proves that the incident which caused the damage occurred more than five years after the date on which the well was abandoned under the authority and in accordance with the requirements of the controlling State. Where a well has been abandoned in other circumstances, the liability of the operator shall be governed by the applicable national law.

5. If the operator proves that the pollution damage resulted wholly or partly either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the operator may be exonerated wholly or partly from his liability to such person."

regulations on sea-bed mining, if the State party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and annex III, article 4, paragraph 2. Paragraph 2 (b) of article 153 deals with joint activities undertaken by the authority, or by natural or juridical persons, or by States Parties to exploit sea-bed resources. Paragraph 4 of the same article provides for control by the authority over activities undertaken by States parties, their enterprises or nationals.

215. Article 8 of the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment provides the grounds for exoneration from liability of the operator. They include act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; acts by a third party which are considered to be outside the control of the operator, and compliance with compulsory measures. 206/ The administrative authorization to conduct the activity or compliance with the requirements of such authorization is not in itself a ground for exoneration from liability. 207/ The Convention also provides that pollution at a tolerable level should be a ground for exemption. The level of pollution which is considered tolerable shall be determined in the light of local conditions and circumstances. The commentary to the article provides that the aim of this provision is to avoid extending the regime of strict liability to "acceptable inconveniences". 208/ It is for the competent court to decide which inconveniences are acceptable having regard to local circumstances. 209/ The Convention also permits for exemption from liability when a dangerous activity is carried out in the interests of the person suffering damage. This situation covers in particular activities undertaken in emergency cases, and those carried out with the consent of the person who has suffered

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206/ Article 8 of the Convention reads:

"the operator shall not be liable under this Convention for damages which he proves (a) was caused by an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional inevitable and irresistible character; (b) was caused by an act done with the intent to cause damage by a third party, despite safety measures appropriate to the type of dangerous activity in question; (c) resulted necessarily from compliance with a specific order or compulsory measure of a public authority; (d) was caused by pollution at tolerable levels under local relevant circumstances; (e) was caused by a dangerous activity taken lawfully in the interest of the person who suffered the damage, whereby it was reasonable towards this person to expose him to the risks of the dangerous activity."

207/ See the explanatory note to the Convention.

208/ See Explanatory Report on the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, document of the Council of Europe, p. 16.

209/ Ibid.

damage. 210/ Under article 9 of the Convention, the court may reduce or disallow compensation to an injured person, if the injury was caused by the fault of the injured person, or by the fault of a person for whom he is responsible.

216. Exoneration from liability is stipulated in a few bilateral a reements. It is provided for only in the case of injuries resulting from oper tions of assistance to the other party, or in such circumstances as war, ma j calamities, etc. Under the 1959 Convention between France and Spa on mutual assistance in case of fire, the party called upon to provide assi nce is exonerated from liability for any damage it might cause. Again, 1961 Treaty between Canada and the United States relating to the Colu a River Basin provides, in article XVIII, that neither of the contracting parties shall be liable for injuries resulting from an act, an omission or a delay resulting from war, strikes, major calamity, act of God, uncontrollable force or maintenance curtailment. 211/

B. JUDICIAL DECISIONS AND STATE PRACTICE OUTSIDE TREATIES

217. The few judicial decisions and sparse official correspondence relevant to liability reveal no incident in which a claim for exoneration from liability has been invoked. In the few cases where the acting State has not paid compensation for injuries caused, the injured State does not appear to have agreed with such conduct or recognized it to be within the right of the acting State. Even after the injuries caused by the nuclear tests which, according to the United States Government, had been necessary for reasons of security, that Government paid compensation for one reason or another without seeking to evade liability.

210/ Ibid.

211/ The article reads in part:

"1. Canada and the United States of America shall be liable to the other and shall make appropriate compensation to the other in respect of any act, failure to act, omission or delay amounting to a breach of the Treaty or of any of its provisions other than an act, failure to act, omission or delay occurring by reason of war, strike, major calamity, act of God, uncontrollable force or maintenance curtailment.

2. Except as provided in paragraph 1, neither Canada nor the United States of America shall be liable to the other or to any person in respect of any injury, damage or loss occurring in the territory of the other caused by any act, failure to act, omission or delay under the Treaty whether the injury, damage or loss results from negligence or otherwise."

CHAPTER IV. COMPENSATION

218. State practice relates to both the content and the procedure of compensation. Some treaties provide for a limitation of compensation (limited liability) in case of injuries. These treaties relate principally to activities generally considered essential to present-day civilization, such as the transport of goods and transport services by air, land and sea. The signatories to such treaties have agreed to tolerate such activities, with the potential risks they entail, provided the damage they may cause is compensated. However, the amount of the compensation to be paid for injuries caused is generally set at a level which, from an economic point of view, does not paralyse the pursuit of these activities or obstruct their development. Clearly, this is a deliberate policy decision on the part of the signatories to treaties regulating such activities and, in the absence of such treaties, judicial decisions do not appear to have set limits on the amount of compensation. The study of judicial decisions and official correspondence has not revealed any substantial limitation on the amount of compensation, although some sources indicate that it must be "reasonable" and that the parties have a duty to "mitigate damages".

A. CONTENT

1. Compensable injuries

219. In a number of domestic laws, compensable injuries include at least death, personal injuries and property damage for torts incurring strict liability. For example, the 1990 German ELA provides in Section 1 that "if anyone suffers death, personal injury, or property damage due to an environmental impact emitted from one of the facilities named in Appendix 1, then the owner of the facility shall be liable to the injured person for the damages caused thereby". 212/

220. In the United States, some federal legislation goes even further and includes cost of clean up and damage to the environment as well. Subsection 2707 (a) of OPA makes a responsible party liable for removal costs. "Removal costs" are defined as "the costs of removal that are incurred after a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such incident." 213/ A responsible party may recover removal costs incurred by it from the Oil Spill Liability Trust Fund where it is entitled to a complete defence. Also section 9607 (a) of CERCLA states that the owner and operator of a vessel or facility from which there is a release or a threatened release of a hazardous substance which causes the incurrence of response costs shall be liable for:

> "(A) all costs of removal or remedial action incurred by the United States Government or a state or an Indian tribe not inconsistent with the national contingency plan;

212/ See M. Kloepfer, Umweltschutz, Textsammlung des Umweltrechts der Bundesrepublik Deutschland, 1989 cited in W. Hoffman, "Germany's New Environmental Liability Act: Strict Liability for Facilities Causing Pollution", Netherlands International Law Review, vol.,38,1991.

213/ 33 U.S.C.A. section 2701 (31).

(B) any necessary costs of response incurred by any other person consistent with the national contingency plan;

...

(D) the costs of any health assessment or health defects study carried out under section 9604 (i) of the Act."

221. Some domestic judicial decisions have dealt with the question of how to evaluate costs of clean-up and restoration. This issue was discussed as early as 1908 in an English court in the case of Lodge Holes Colliery Co. v. Mayor of Wednesbury 214/ where the defendants' mining operations caused a public road to collapse. The local authorities restored the road to its former level, but at great cost. The House of Lords held that the principle of restitutio in integrum did not entitle the plaintiffs to the cost of precise restoration, regardless of the cost. The plaintiffs were entitled to recover from the defendants only the cost of construction of an equally suitable road. 215/ This policy was applied in 1980 in the case of Dodd Properties (Kent) v. Canterbury City Council. 216/ In assessing the damages to the building of the plaintiffs caused by pile-driving operations of the defendants, the court said:

> "The plaintiffs are ... not bound to accept a shoddy job or put up with an inferior building for the sake of saving expense to the defendants. But I [the judge] do not consider that they are entitled to insist on complete and meticulous restoration when a reasonable building owner would be content with less extensive work which produces a result which does not diminish to any, or any significant, extent the appearance, life or utility of the building, and when there is also a vast difference in the cost of such work and the cost of meticulous restoration." 217/

222. A similar question arose in the United States First Circuit Court of Appeals in 1980 in the case of Commonwealth of Puerto Rico v. The S.S. Zoe Colocotroni. 218/ The case concerned an oil tanker which ran aground because of its unseaworthy condition, causing pollution damage to the coast of Puerto Rico. First, the Puerto Rico authorities were awarded $6 million, of which only $78,000 was needed for cleaning up. The remainder was the cost of replanting mangroves and replacing marine organisms killed by the spill. The Court of Appeals did not endorse this approach. Emphasizing the need for a sense of proportion in assessing such costs, the Court observed:

214/ 1908 AC p. 323, cited in Colin de la Rue, "Environmental Damage Assessment" in Transnational Environmental Liability and Insurance, op. cit., p. 71, note 1.

215/ Ibid.

216/ WLR, vol. 1, 1980, p. 333, cited in ibid.

217/ Quoted in ibid.

218/ 628 F.2 d, p. 652 (1st Cir. 1980), cited in ibid. The description of this case is taken from ibid.

> "[Recoverable costs are costs] reasonably to be incurred ... to restore or rehabilitate the environment in the affected area to its pre-existing condition, or as close thereto as is possible without grossly disproportionate expenditures. The focus in determining such a remedy should be the steps a reasonable and prudent sovereign or agency would take to mitigate the harm done by the pollution, with attention to such factors as technical feasibility, harmful side effects, compatibility with or duplication of such regeneration as is naturally to be expected, and the extent to which efforts beyond a certain point would become either redundant or disproportionately expensive". 219/

223. Section 311 (f) of FWPCA of the United States also provides for recovery of the expenses of replacing and restoring natural resources that had been damaged or destroyed.

224. Section 2706 of OPA states that a governmental entity may recover "damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage". Subsection 2706 (2) of the Act defines "natural resources" as including "land, fish, wild life, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone), any state or local government or Indian tribe, or any foreign government." As regards measure of damages, subsection 2706 (d) of the Act states the following:

> "(A) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources;
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> (B) the diminution of those natural resources pending restoration; plus
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> (C) the reasonable cost of assessing those damages."

225. Subsection 2702 (b) (2) authorizes the United States Government, a state and a political subdivision to recover "damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources ..." and "damages for net costs of providing increase or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil ... ."

226. The United States CERCLA also provides in section 9607 (a) for damages for injury to natural resources: "(C) Damages for injuries to, destruction of, or loss of natural resources, including the reasonable cost of assessing such injury, destruction, or loss resulting from such a release." Damages recovered may only be used to restore, replace or acquire the equivalent of the damage to natural resources.

227. In the case of the Exxon Valdez oil tanker which ran aground

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219/ Quoted in ibid.

on 24 March 1989 in Alaska's Prince William Sound, and resulted in the largest oil spill in U.S. history, the U.S. government, while taking steps in the cleaning up operation, conducted a study on measuring damages to the environment. 220/ That study was never released, because the case was settled out of court. The settlement called Exxon to pay $25 million in criminal penalties and $100 million in restitution to federal and state agencies for repairs to the damaged environment of Prince William Sound. 221/ In consideration of $2.5 billion spent by Exxon by the time of settlement for cleaning up the spill, another $125 million in criminal fines was forgiven. 222/ This settlement was only with federal and state authorities and did not include private claims.

228. Damage to private individuals either in the form of personal injuries or loss of property has also been considered recoverable under domestic law. For example, under section 2702 (b) of OPA, any person may recover "damages for injury to, or economic losses resulting from the destruction of real or personal property which shall be recoverable by a claimant who owns or leases that property." It also allows any person who uses natural resources which have been injured, destroyed or lost to recover damages for loss of subsistence use of natural resources, without regard to the ownership or management of the resources. The subsection also provides that any person may recover "damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources". 223/

229. CERCLA did not expressly create the right of action for damages for private persons except, under certain circumstances, for removal costs. However, subsection 9607 (h) of the Act was amended to remedy this problem. It now provides that the owner or operator of a vessel shall be liable under maritime tort law and as provided under section 9614 of the Act, notwithstanding any provision on limitation of liability or the absence of any physical damage to the proprietary interest of the claimant. 224/

230. As regards the determination of whether there has been lost profit, in the United Kingdom, the rule of "remoteness" has tended to exclude claims for "pure economic loss". 225/ This is illustrated in the case of

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220/ See John Lancaster, "Value of Intangible Losses from Exxon Valdez Spill Put at $3 Billion", Wash. Post, 20 March 1991, p. A-4, and Frank B. Cross, "Natural Resources Damage Valuation", Vand. L. Rev., vol. 42, 1989, pp. 297-320.

221/ Michael Parrish, "Exxon reaches 1.1 billion Spill Settlement Deal", L.A. Times, 1 October 1991, p. A-1.

222/ Ibid.

223/ Emphasis added.

224/ See Robert Force, "Insurance and Liability for Pollution in the United States", in Transnational Environmental Liability and Insurance, ed by Ralph P. Kröner, 1993, p. 34.

225/ See Colin de la Rue, "Environmental Damage Assessment", op cit., p. 73.

Weller and Co v. Foot and Mouth Disease Research Institute, 226/ where cattle had been infected with foot and mouth disease by a virus that escaped from the defendants's premises. The Government of the United Kingdom made an order closing two markets in the area, causing a loss of profits to the plaintiff auctioneers. The court held that the defendant owed a duty of care to the cattle owners, but not to the auctioneers who did not have any proprietary interest which could have been damaged by the escape of the virus. 227/ It has been observed that this rule of "remoteness" is normally applied with considerable flexibility, taking into account policy considerations. 228/

(a) Treaty practice

231. Under a number of conventions, material injuries such as loss of life, loss of or damage to property are compensable injuries. Article I of the 1963 Vienna Convention on Civil Liability for Nuclear Damage defines nuclear damage as follows:

> "(i) loss of life, any personal injury or any loss of, or damage to, property which arises out of or results from the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or radioactive products or waste in, or of nuclear material coming from, originating in, or sent to, a nuclear installation;
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> ...
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> (iii) if the law of the Installation States so provides, loss of life, any personal injury or any loss of, or damage to, property which arises out of or results from other ionizing radiation emitted by any other source of radiation inside a nuclear installation."

232. The Additional Convention to CIV provides for the payment of necessary expenses such as the cost of medical treatment and transport, and compensation for loss due to partial or total incapacity to work and increased expenditure on the injured person's personal requirements necessitated by the injury. In the event of the death of the passenger, the compensation must cover the cost of transport of the body, burial or cremation. If the deceased passenger had a legally enforceable duty to support other persons who are now deprived of such support, such persons are entitled to compensation for those to whom the deceased was providing support on a voluntary basis. 229/

226/ QB vol. 1, 1966, p. 569 cited in ibid. p. 73.

227/ Ibid.

228/ See ibid.

229/ Articles 3 and 4 of the Convention read:

> "Article 3. Damages in case of death of the passenger
>
> 1. In the case of the death of the passenger the damages shall include:

233. Under the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources, not only "pollution damage" but also preventive measures are compensable (art. 1, para. 6). Preventive measures are defined as "any reasonable measures taken by any person in relation to a particular incident to prevent or minimize pollution damage with the exception of well-control measures and measures taken to protect, repair or replace an installation" (art. 1, para. 7).

234. The Protocol of 1984 to Amend the International Convention on Civil Liability for Oil Pollution Damage of 1969 was intended to increase the maximum amount of compensation under the 1969 Convention. The Protocol also expanded the concept of "pollution damage" as defined in the 1969 Convention. 230/ Under the 1984 Protocol, "pollution damage" means:

"(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;

(a) any necessary expenses following on the death, in particular the cost of transport of the body, burial and cremation;

(b) if death does not occur at once, the damages defined in article 4.

2. If, through the death of the passenger, persons towards whom he had, or would have had in the future, a legally enforceable duty to maintain are deprived of their support, such persons shall also be indemnified for their loss. Rights of action for damages by persons whom the passenger was maintaining without being legally bound to do so shall be governed by national law.

Article 4. Damages in case of personal injury to the passenger

In the case of personal injury or any other bodily or mental harm to the passenger the damages shall include:

(a) any necessary expenses, in particular the cost of medical treatment and transport;

(b) compensation for loss due to total or partial incapacity to work, or to increased expenditure on his personal requirements necessitated by the injury".

230/ Article 1 (6) of the 1969 Convention defines "pollution damage" as:

"... loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures."

(b) the costs of preventive measures and further loss or damage caused by preventive measures". 231/

235. The Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment of 9 March 1993 define damages in article 2 (7) as:

"a. Loss of life or personal injury;

b. Loss or damage to property other than to the installation itself or property held under the control of the operator, at the site of the dangerous activity:

c. Loss or damage by impairment of the environment in so far as this is not considered to be damage within the meaning of sub-paragraphs (a) or (b), provided that compensation for impairment of the environment, other than for loss of profit from such impairment, shall be limited to the costs of measures of reinstatement actually undertaken;

d. The costs of preventive measures and further loss or damage caused by preventive measures, to the extent that the loss or damage referred to in subparagraphs (a) to (c) of this paragraph arises out of or results from the hazardous properties of the dangerous substances, genetically modified organisms or micro-organisms or arises or results from waste."

236. Paragraph 7 of article 2 defines "measures of reinstatement" as "any reasonable measures aiming to reinstate or restore damaged or destroyed components of the environment or to introduce, where reasonable, the equivalent of these components into the environment." Paragraph 9 of article 2 defines "preventive measures" as "any reasonable measures taken by any person after an incident has occurred to prevent or minimise loss or damage ..."

237. The Convention does not address the question of threshold of impairment to the environment in article 2. It attempts to deal with the issue in article 8 on exemptions where paragraph (d) of that article exonerates the operator from liability if the operator can prove that damage "was caused by pollution at tolerable levels under local relevant circumstances".

238. If the person who suffered damage was responsible for such damage or contributed to such damage, "the compensation may be reduced or disallowed having regard to all the circumstances." (art. 9).

239. Paragraph 2 of Principle 9 of the Principles relevant to the Use of Nuclear Power Sources in Outer Space (G.A.Res. 47/68) provides for restitution in integrum. The relevant part of the paragraph reads that "[the liable State

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231/ IMO doc. LEG/CONF.6/66 of 25 May 1984. The Convention was open for signature from 1 December 1984 to 30 November 1985 by all States.

shall] provide such reparation in respect of the damage as will restore the..[the injured party] to the condition which would have existed if the damage had not occurred."

240. Under the 1988 Antarctic Convention, the operator is liable for loss or damage to property or personal injury and loss of life (art.8 (2) (b) and (c)). Under the same Convention, the operator is also liable for payment of compensation in the event that the Antarctic environment or dependent or associated ecosystems can not be restored to the status quo ante (art. 8 (2) (a)).

241. The Convention furthermore, provides that the liable operator shall provide for reimbursement of reasonable costs by whomsoever incurred relating to necessary response action, including prevention, containment, clean up and removal measures, and action taken to restore the status quo ante where Antarctic mineral resource activities undertaken by that operator result in or threaten to result in damage to the Antarctic environment or dependent or associated ecosystems (art. 8 (2) (d)).

242. The concept of "damage" has also been defined in paragraph 10 of article 1 of CRTD as "(a) loss of life or personal injury ...; (b) loss of or damage to property ...; (c) loss or damage by contamination to the environment caused by the dangerous goods, provided that compensation for impairment of the environment other than for loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; (d) the costs of preventive measure." Under the last clause of the article, where it is not reasonably possible to separate damage caused by the dangerous goods from that caused by other factors, all such damage shall be deemed to be caused by the dangerous goods. The same definition has been adopted for "damage" in paragraph 6 of article 1 of HNS.

243. The draft protocol to the Basel Convention defines in article 2 "damage" as "(i) loss of life or personal injury; (ii) loss or damage in accordance with the present Protocol; (iii) loss of profit from impairment of the environment; (iv) impairment of the environment, in so far as this is not considered to be within the meaning of subparagraphs (i), (ii) or (iii) ..; (v) the costs of preventive measures; (vi) any loss or damage caused by preventive measures; ". Draft article 4 of the draft protocol allows a claimant to invoke the forms or modalities of compensation in respect of damage defined in (i), (ii) and (iii). With respect to damage to the environment, article 4 ter provides:

"(a) if the environment can be reinstated, compensation shall be limited to

(i) the costs of measures of reinstatement actually undertaken or to be undertaken, or

(ii) the costs of returning the environment to a comparable state, where reasonable,

(b) if the environment cannot be reinstated.

Alternative 1

compensation shall be limited to an amount calculated as if the environment could be reinstated.

Alternative 2

compensation shall be calculated only taking into account the following: intrinsic value of the ecological systems involved including their aesthetic and cultural values and in particular the potential loss of value entailed in the destruction of a species or flora or fauna. [Punitive damages shall not form part of the calculation under this subparagraph;]

(c) where compensation is received for damage to the environment that cannot be reinstated, it shall be used for purpose of environmental reinstatement which may include the creation of a comparable environment in another area;

(d) [national law] [shall] [may] determine who is entitled to take measures of reinstatement and receive the compensation in (a), (b) and (c)."

244. A few conventions dealing with nuclear materials include express provisions concerning damage other than nuclear damage caused by a nuclear incident or jointly by a nuclear incident and other occurrences. To the extent that those injuries are not reasonably separate from nuclear damage, they are considered nuclear damage and consequently compensable under the conventions. 232/

232/ For example, article IV, paragraph 4, of the 1963 Vienna Convention on Civil Liability for Nuclear Damage provides:

"4. Whenever both nuclear damage and damage other than nuclear damage have been caused by a nuclear incident or jointly by a nuclear incident and one or more other occurrences, such other damage shall, to the extent that it is not reasonably separable from the nuclear damage, be deemed, for the purposes of this Convention, to be nuclear damage caused by that nuclear incident. Where, however, damage is caused jointly by a nuclear incident covered by this Convention and by an emission of ionizing radiation not covered by it, nothing in this Convention shall limit or otherwise affect the liability, either as regards any person suffering nuclear damage or by way of recourse or contribution, of any person who may be held liable in connection with that emission of ionizing radiation."

Similarly, article IV of the 1962 Convention on the Liability of Operators of Nuclear Ships provides:

"Whenever both nuclear damage and damage other than nuclear damage have been caused by a nuclear incident or jointly by a nuclear incident and one or more other occurrences and the nuclear damage and such other damage are not reasonably separable, the entire

245. Non-material injuries may also be compensable. Thus it is clearly stated in article 5 of the Additional Convention to CIV that under national law compensation may be required for mental, physical pain and suffering and for disfigurement:

> "National law shall determine whether and to what extent the railway shall be bound to pay damages for injuries other than those for which there is provision in articles 3 and 4, in particular for mental or physical pain and suffering (*pretium doloris*) and for disfigurement".

246. Under article I of the 1963 Vienna Convention on Civil Liability for Nuclear Damage, loss or damage are compensable under the law of the competent court. Hence, if the law of the competent court provides for compensability of non-material injury, such injury is compensable under the Convention. Article I, paragraph 1 (k) (ii), of the Convention reads that "nuclear damage" means:

> "(ii) any other loss or damage so arising or resulting if and to the extent that the law of the competent court so provides ...;"

247. Paragraph 3 of Principle 9 of the Principles Relevant to the Use of Nuclear Power Sources in Outer Space (G.A. Res.47/68) also provides that "compensation shall include reimbursement of the duly substantiated expenses for search, recovery and clean-up operations, including expenses for assistance received from third parties."

(b) Judicial decisions and State practice outside treaties

248. The few existing judicial decisions and State practice reveal that only material injuries are compensable. Material injuries here refer to physical, tangible or quantitative injuries, as opposed to intangible harm to the dignity of the State. Material injuries which have been compensated in the past include loss of life, personal injury and loss of or damage to property. This has not, however, prevented States from claiming compensation for non-material injuries.

249. State practice shows that in some cases involving potential or actual nuclear contamination or other damage caused by nuclear accidents, which have given rise to great anxiety, reparation has neither been made nor claimed for non-material injury. The outstanding examples are the Palomares incident and the Marshall Islands case. The Palomares incident involved the collision between a United States B-52G nuclear bomber and a KC-135 supply plane during

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damage shall, for the purposes of this Convention, be deemed to be nuclear damage exclusively caused by the nuclear incident covered by this Convention and by an emission of ionizing radiation or by an emission of hazardous properties of the source of radiation not covered by it. Nothing in this Convention shall limit or otherwise affect the liability, either as regards the victims or by way of recourse or contribution, of any person who may be held liable in connection with the emission of ionizing radiation or by the toxic, explosive or other hazardous properties of the source of radiation not covered by this Convention."

a refuelling operation off the coast of Spain, resulting in the dropping of four plutonium-uranium 235 hydrogen bombs, with a destructive power of 1.5 megatons (75 times the power of the Hiroshima bomb). 233/ This incident created not only substantial material damage, but also gave rise to fears and anxiety throughout the western Mediterranean basin for two months, until the causes of potential damage had been neutralized. Two of the bombs that fell on land ruptured and discharged their TNT, scattering uranium and plutonium particles near the Spanish coastal village of Palomares, thereby causing imminent danger to the health of the inhabitants and the ecology of the area. Immediate remedial action was taken by the United States and Spain, and it is reported that the United States removed 1,750 tons of mildly radioactive Spanish soil and buried them in the United States. 234/ The third bomb hit the ground intact, but the fourth bomb was lost somewhere in the Mediterranean. After a two-month search by submarines and growing apprehension among the nations of the Mediterranean area, the bomb was located, but was lost during the operation for nine more days. Finally, after 80 days of the threat of detonation of the bomb, the device was retrieved.

250. Apparently, the United States did not pay any compensation for the apprehension caused by the incident, and there was no formal "open discussion" between Spain and the United States about the legal liability. The accident, however, is unique; if the bomb had not been retrieved, the extent of its damage could not have been measured in monetary terms. The United States could not have left the dangerous "instrument" of its activity in or near Spain and discharged its responsibility by paying compensation.

251. Following the nuclear tests in the atmosphere undertaken by the United States in Eniwetok Atoll, in the Marshall Islands, the Japanese Government did not demand compensation for non-material injuries. In a note by the United States Government concerning the payment of damages through a global settlement, the United States Government referred to the final settlement with the Japanese Government for "any and all injuries, losses, or damages arising out of the said nuclear tests". It was left to the Japanese Government to determine which individual injuries deserved compensation.

252. Following nuclear testing on 1 March 1954, at the Eniwetok testing grounds, the Government of Japan announced that injuries from radioactive fallout had been sustained on that date by members of the crew of a Japanese fishing vessel, the Diago Fukuryu Maru, which at the time of the test was outside the danger zone previously defined by the United States. On 23 September 1954, the chief radio operator, Aikichi Kuboyama, of the fishing vessel died. By an Agreement effected by exchange of notes on 4 January 1955, which entered into force the same day, the United States tendered, ex gratia, "as an additional expression of its concern and regret over the injuries sustained" by Japanese fishermen as a result of the nuclear tests in 1954 in the Marshall Islands, the sum of $2 million for purposes of

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233/ For further details on this accident, see T. Szuld, The Bombs of Palomares, (New York, Viking Press, 1967), and F. Lewis, One of our H-bombs is Missing (New York, McGraw Hill, 1967).

234/ "Radioactive Spanish earth is buried 10 feet deep in South Carolina", *The New York Times*, 12 April 1966, p. 28, col. 3.

compensation for the injuries or damages sustained, and in full settlement of any and all claims on the part of Japan for any and all injuries, losses, or damages arising out of the said nuclear tests. The sum paid was, under the Agreement, to be distributed in such an equitable manner as might be determined by the Government of Japan and included provision for a solatium on behalf of each of the Japanese fishermen involved and for the claims advanced by the Government of Japan for their medical and hospitalization expenses. 235/

253. In the Trail Smelter case, the Tribunal rejected the United States proposal that liquidated damages be imposed on the operator of the smelter whenever emissions exceeded the predefined limits, regardless of any injuries it might cause. The tribunal stated:

> "The Tribunal has carefully considered the suggestions made by the United States for a regime by which a prefixed sum would be due whenever the concentrations recorded would exceed a certain intensity for a certain period of time or a certain greater intensity for any twenty minute period.
>
> It has been unable to adopt this suggestion. In its opinion, and in that of its scientific advisers, such a regime would unduly and unnecessarily hamper the operations of the Trail Smelter and would not constitute a "solution fair to all parties concerned." 236/

254. The Tribunal took the view that only actual injuries incurred deserved compensation.

255. It may therefore be assumed that the concept of non-material injury so far has not been accepted in State practice in connection with activities causing extraterritorial injuries. States have not made monetary or other reparation for non-material damage. However, States have sometimes demanded reparation for such damage. In at least one case, a State has demanded compensation for violation of its territorial sovereignty. When the Cosmos 954 crashed on Canadian territory, Canada demanded compensation for the injuries it had sustained by reason of the crash, including violation by the satellite of its territorial sovereignty. Basing its claim on "international precedents", Canada stated:

> "The intrusion of the Cosmos 954 satellite into Canada's air space and the deposit on Canadian territory of hazardous radioactive debris from the satellite constitutes a violation of Canada's sovereignty. This violation is established by the mere fact of the trespass of the satellite, the harmful consequences of this intrusion being the damage caused to Canada by the presence of hazardous radioactive debris and the interference with the sovereign right of Canada to determine the acts

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235/ Whiteman, op. cit. vol. 4, p. 565.

236/ United Nations, *Reports of International Arbitral Awards*, vol. III, p. 1974.

that will be performed on its territory. International precedents recognize that a violation of sovereignty gives rise to an obligation to pay compensation." 237/

256. In the Trail Smelter case, in reply to the United States claim for damages for wrong done in violation of its sovereignty, the tribunal held that it lacked jurisdiction. The tribunal found it unnecessary to decide whether the facts proven did or did not constitute an infringement or violation of sovereignty of the United States under international law independently of the Arbitration Convention. 238/

257. State practice reveals remedies for instances of potential material damage. This category of practice is parallel to the role of injunction in judicial decisions, as in the Nuclear Tests case. There can certainly be no material injury prior to the operation of a particular injurious activity. Nevertheless, in a few instances, negotiations have taken place to secure the adoption of protective measures, and even to demand the halting of the proposed activity. Such demands have been based on the gravity of the potential damage entailed. The general feeling seems to be that States must take reasonable protective measures to ensure, outside the limits of their territorial sovereignty, the safety and harmlessness of their lawful activities. Of course, the potential harm must be incidental and unintentional; none the less, the potentially injured States have the right to demand that protective measures be taken.

258. State practice regarding liability for reparation of actual damage is more settled. There is clearer acceptance of the explicit or implicit liability of States for their behaviour. In connection with a few incidents, States have also accepted responsibility for reparation of actual damage caused by the activities of private persons in their territorial jurisdiction or under their control. In the River Mura incident, the former Yugoslavia claimed damages from Austria for the economic loss incurred by two paper mills and by the fisheries, as a result of the extensive pollution caused by the Austrian hydroelectric facilities. In the tanker Juliana incident, the flag State, Liberia, offered 200 million yen to the Japanese fishermen in compensation for the damage which they had suffered as a result of the Juliana running aground and washing its oil on to the coast of Japan.

259. Compensation has been made where an activity occurring in the shared domain has required the relocation of people. In connection with the United States nuclear tests in the Eniwetok Atoll, the compensation entailed payment for temporary usage of land and for relocation costs.

260. In the Trail Smelter case, the tribunal awarded the United States damages in respect of physical damage to cleared land and uncleared land and buildings by reason of the reduction in crop yield and in the rental value of the land and buildings and, in one instance, of soil impairment. The denial of damages for other injuries, it appears, resulted mainly from failure of proof. With

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237/ International Legal Materials (Washington, D.C.), vol. 18, p. 907, para. 21.

238/ United Nations, *Reports of International Arbitral Awards*, vol. III, p. 1932.

respect to damage to cleared land used for crops, the tribunal found that damage through reduction in crop yield due to fumigation had occurred in varying degrees during each of the years 1932 to 1936, but found no proof of damage in the year 1937. The properties owned by individual farmers which allegedly had suffered damage had been divided by the United States into three classes: *(a)* properties of "farmers residing on their farms; *(b)* properties of "farmers who do not reside on their farms"; *(a, b)* properties of "farmers who were driven from their farms"; and *(c)* properties of large owners of land. The tribunal did not adopt that division, and adopted as the measure of indemnity to be applied on account of damage in respect of cleared land used for crops the measure of damages which the American courts applied in cases of nuisance or trespass of the type involved in the case, namely, the amount of reduction in the value of use or rental value of the land caused by fumigations. 239/

261. The Tribunal found that, in the case of farm land, reduction in the value of its use was in general the amount of the reduction of the crop yield arising from injury to crops, less cost of marketing the same. 240/ In the opinion of the Tribunal, the failure of farmers to increase their seeded land in proportion to such increase in other localities might also be taken into consideration. This is an example of the duty to mitigate the injury.

262. With regard to the problem of abandonment of properties by their owners, the Tribunal noted that practically all such properties listed appeared to have been abandoned prior to the year 1932. In order to deal with that problem as well as with that of farmers who had been unable to increase their seeded land, the Tribunal decided to estimate the damage on the basis of the statistical data available concerning the average acreage on which it was reasonable to believe that crops would have been seeded and harvested during the period under consideration but for the fumigations. 241/

263. With regard to claims for impairment of the soil content through increased acidity produced by the sulphur dioxide contained in the waters, the Tribunal considered that the evidence put forward in support of that contention was not conclusive, except for one small area in respect of which an indemnity was allowed for reduction in the value of farms in proximity to the frontier line by reason of their exposure to the fumigations. 242/ The tribunal also awarded an indemnity for reduction in the value of farms in proximity to the frontier line by reason of their exposure to the fumigations. 243/

264. With regard to the claim that the fumes had inhibited the growth and reproduction of timber, the tribunal adopted the measure of damages applied in United States courts, namely, reduction in value of the land itself due to such destruction and impairment:

239/ Ibid., pp. 1924-1925.

240/ Ibid., p. 1925.

241/ Ibid.

242/ Ibid.

243/ Ibid., p. 1926.

"*(b)* With regard to damage due to destruction and impairment of growing timber (not of merchantable size), the Tribunal has adopted the measure of damages applied by American courts, *viz.*, the reduction in value of the land itself due to such destruction and impairment. Growing timberland has a value for firewood, fences, etc. as well as a value as a source of future merchantable timber. No evidence has been presented by the United States as to the locations or as to the total amounts of such growing timber existing on 1 January 1932, or as to its distribution into types of conifers - yellow pine, Douglas fir, larch or other trees. While some destruction or impairment, deterioration, and retardation of such growing timber has undoubtedly occurred since such date, it is impossible to estimate with any degree of accuracy the amount of damage. The Tribunal has, however, taken such damage into consideration in awarding indemnity for damage to land containing growing timber." 244/

265. The United States had failed to prove damage in respect of livestock. 245/ Again, proof of damage to property in the town of Northport was also insufficient. 246/

266. With regard to damages in respect of business enterprises, the United States had claimed that the businessman had suffered loss of business and impairment of the value of goodwill because of the reduced economic status of the residents of the damaged area. The Tribunal found that such damage was too indirect, remote and uncertain to be appraised and not such for which an indemnity could be awarded. In the opinion of the Tribunal, the argument that indemnity should be obtained for an injury to or reduction in a man's business due to the inability of his customers or clients to buy - which inability or impoverishment had been caused by a nuisance, even if proved - was too indirect and remote to become the basis, in law, for an award of indemnity. 247/

244/ Ibid., pp. 1929-1931.

245/ (3) With regard to "damages in respect of livestock", claimed by the United States, the Tribunal is of the opinion that the United States has failed to prove that the presence of fumes from the Trail Smelter has injured either the livestock or the milk or wool productivity of livestock since 1 January 1932, through impaired quality of crop or grazing. So far as the injury to livestock is due to reduced yield of crop or grazing, the injury is compensated for in the indemnity which is awarded herein for such reduction of yield.

246/ (4) With regard to "damages in respect of property in the town of Northport", the same principles of law apply to assessment of indemnity to owners of urban land as apply to owners of farm and other cleared land, namely, that the measure of damage is the reduction in the value of the use or rental value of the property, due to fumigations. The Tribunal is of the opinion that there is no proof of damage to such urban property; that even if there were such damage, there is no proof of facts sufficient to enable the Tribunal to estimate the reduction in the value of the use or rental value of such property; and that it cannot adopt the method contended for by the United States of calculating damages to urban property.

247/ Ibid.

267. The United States contention of pollution of waterways had not been proved and since the Tribunal considered itself bound by the terms of the Arbitration Convention, it did not consider the United States request for indemnity for money expended in the investigation undertaken concerning the problems created by the smelter. The United States had made this claim in connection with its action for violation of sovereignty. The tribunal, however, appeared to recognize the possibility of granting indemnity for the expenses of processing claims. It agreed that in some cases of international arbitration, damages had been awarded for expenses, not as compensation for violation of territorial sovereignty, but as compensation for expenses incurred by individual claimants in prosecuting their claims for wrongful acts by the offending Governments. For the Tribunal, the difficulty lay not so much in the content of the claim as in its characterization as damages for violation of territorial sovereignty. It therefore decided that "neither as a separable item of damage nor as an incident to other damage should any award be made for that which the United States terms 'violation of sovereignty'". 248/

268. In the Alabama case, the tribunal awarded damages in respect of net freights lost and other undefined damage resulting from Great Britain's failure to exercise "due diligence". However, damages in respect of the costs of pursuit of the confederate cruisers outfitted in British ports were denied because such costs could not be distinguished from the ordinary expenses of the war, as were damages in respect of prospective earnings since they depended on future and uncertain contingencies. 249/

269. In its claim against the Soviet Union for injuries resulting from the crash of the Soviet nuclear-powered satellite, Cosmos 954, on Canadian territory, Canada stressed the duty to mitigate damages:

> "Under general principles of international law, Canada had a duty to take the necessary measures to prevent and reduce the harmful consequences of the damage and thereby to mitigate damages. Thus, with respect to the debris, it was necessary for Canada to undertake without delay operations of search, recovery, removal, testing and clean-up. These operations were also carried out in order to comply with the requirements of the domestic law of Canada. Moreover, article VI of the Convention [on International Liability for Damage caused by Space Objects] imposes on the claimant State a duty to observe reasonable standards of care with respect to damage caused by a space object." 250/

270. The Canadian claim also indicated that the compensation sought was reasonable, proximately caused by the accident and capable of being calculated with a reasonable degree of certainty:

> "In calculating the compensation claimed, Canada has applied the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its

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248/ Ibid., pp. 1932-1933.

249/ Moore, op. cit., p. 658.

250/ International Legal Materials (Washington, D.C.), vol. 18, pp. 905-906, para. 17.

claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty". 251/

271. The Atlantic Richfield Corporation (ARCO), which operated the refinery at Cherry Point, in the State of Washington, where some 12,000 gallons of crude oil had spilled into the sea in 1972 (see para. 436 above), paid an initial clean-up bill of $19,000 submitted by the municipality of Surrey to cover its operations. ARCO later agreed to pay another $11,696.50, to be transmitted by the United States to the Canadian Government, for its costs incurred in connection with the clean-up operation, but refused to reimburse an additional item of $60 designated "bird loss (30 birds at $2 a bird)". The payment was made "without admitting any liability in the matter and without prejudice to its rights and legal position". 252/

2. FORMS OF COMPENSATION

272. In State practice, compensation for extraterritorial damage caused by activities conducted within the territorial jurisdiction or under the control of States has been paid either in the form of a lump sum to the injured State, so that it may settle individual claims, or directly to the individual claimants. The forms of compensation prevailing in relations between States are similar to those existing in domestic law. Indeed, some conventions provide that national legislation is to govern the question of compensation. When damages are monetary, States have generally sought to select readily convertible currencies.

(a) Treaty practice

273. While references to the forms of compensation are made in multilateral conventions, they are not very detailed. Attempts have been made in the conventions to make the compensation provisions useful to the injured party in terms of currency and of its transferability from one State to another. Under the 1960 Convention on Third Party Liability in the Field of Nuclear Energy, for example, the nature, form and extent of the compensation as well as its equitable distribution has to be governed by national law. Furthermore, the compensation must be freely transferable between the contracting parties. 253/

251/ Ibid., p. 907, para. 23.

252/ *The Canadian Yearbook of International Law 1973*, vol. 11, pp. 333-334; and *Montreal Star*, 9 June 1972.

253/ The relevant provisions of the Convention are:

Article 7

...

(g) Any interest and costs awarded by a court in actions for compensation under this Convention shall not be considered to be compensation for the purposes of this Convention and shall be payable by the operator in addition to any sum for which he is liable in accordance with this article.

274. The Additional Convention to CIV also provides that, for certain injuries, compensation may be awarded in the form of a lump sum. However, if national law permits, payment of an annuity or, if the injured passenger so requests, compensation, shall be awarded as an annuity. Such forms of damages are also provided for injuries suffered by persons for whose support the deceased passenger was legally responsible, as well as for medical treatment and transport of an injured passenger and for loss due to his total or partial incapacity to work. 254/

275. The 1962 Convention on the Liability of Operators of Nuclear Ships states the value in gold of the franc, the currency in which compensation must be paid. It also provides that the awards may be converted into each national

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Article 11

The nature, form and extent of the compensation, within the limits of this Convention, as well as the equitable distribution thereof, shall be governed by national law.

Article 12

Compensation payable under this Convention, insurance and re-insurance premiums, sums provided as insurance, re-insurance, or other financial security required pursuant to article 10, and interest and costs referred to in article 7 *(g)*, shall be freely transferable between the monetary areas of the Contracting Parties.

254/ The relevant provisions of the Convention read:

"Article 6. Form and limit of damages in case of, or personal injury to the passenger

1. The damages under article 3 (2) and article 4 (b) shall be awarded in the form of a lump sum; however, if national law permits payment of an annuity, damages shall be awarded in this form if so requested by the injured passenger or the claimants designated in article 3 (2).

...

Article 9. Interest and refund of compensation

1. The claimant shall be entitled to claim interest on compensation which shall be calculated at the rate of 5 per cent per annum. Such interest shall accrue from the date of the claim, or, if a claim has not been made, from the date on which legal proceedings are instituted, save that for compensation due under articles 3 and 4, interest shall accrue only from the day on which the events relevant to its assessment occurred, if that day is later than the date of the claim or the date on which legal proceedings were instituted.

2. Any compensation improperly obtained shall be refunded."

currency in round figures and that conversion into national currencies other than gold shall be effected on the basis of their gold value. 255/

276. If agreed between the parties concerned, compensation under the 1972 Convention on International Liability for Damage Caused by Space Objects may be paid in any currency; otherwise, it is to be paid in the currency of the claimant State. If the claimant State agrees, the compensation may be paid in the currency of the State from which compensation is due. 256/

(b) Judicial decisions and State practice outside treaties

277. Forms of compensation are referred to in judicial decisions and official correspondence in only a few cases, such as the compensation afforded Japan by the United States for injuries arising out of the Pacific nuclear tests and the compensation required of the United Kingdom in the Alabama case. 257/ In each case, a lump sum payment was made to the State which could then pay equitable compensation to the injured individuals.

278. In addition to monetary compensation, compensation has occasionally taken the form of removing the danger or effecting restitutio in integrum. That was the case, for example, in the Palomares incident, in 1966, when nuclear bombs dropped on Spanish territory and near the coasts of Spain following a collision between a United States nuclear bomber and a supply plane. In a situation where the damage or danger of damage is so grave, the primary compensation is restitution, that is, removing the cause of the damage and restoring the area to its condition prior to the incident. The United States removed the causes of danger from Spain by retrieving the bombs and by removing the contaminated Spanish soil and burying it in its own territory. 258/

279. Following the nuclear tests conducted in the Marshall Islands, the United States reportedly spent nearly $110 million to clean up several of the islands of the Eniwetok Atoll so that they could again become habitable. However, one of the islands of the Runit Atoll, which had been used to bury

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255/ Paragraph 4 of article III of the Convention reads:

"4. The franc mentioned in paragraph 1 of this article is a unit of account constituted by sixty-five and one half milligrams of gold of millesimal finess nine hundred. The amount awarded may be converted into each national currency in round figures. Conversion into national currencies other than gold shall be effected on the basis of their gold value at the date of payment."

256/ Article XIII of the Convention reads:

"Unless the claimant State and the State from which compensation is due under this Convention agree on another form of compensation, the compensation shall be paid in the currency of the claimant State or, if that State so requests, in the currency of the State from which compensation is due."

257/ Moore, op. cit., p. 568.

258/ The New York Times, 12 April 1966, p. 28, col. 3.

nuclear debris, was declared off-limits for 20,000 years. 259/ A clean-up operation is not restitution, but the intention and the policy behind it are similar. Following the accidental pollution of the Mura River, Austria, in addition to paying monetary compensation for the damage caused to the former Yugoslav fisheries and paper mills, delivered a certain quantity of paper to Yugoslavia.

280. In 1981, Canada agreed to a lump payment of three million Canadian dollars from the former Soviet Union in full and final settlement of all matters connected with the disintegration of the Soviet satellite Cosmos 954 in Canada. 260/

3. LIMITATION ON COMPENSATION

281. As in domestic law, State practice has provided for limitations on compensation, particularly in connection with activities which, although important to present-day civilization, can be very injurious, as well as with activities capable of causing accidental but devastating injuries, such as those involving the use of nuclear materials. The provisions on limitation of compensation have been carefully designed to fulfil two objectives: (a) to protect industries from an unlimited liability that would paralyse them financially and discourage their future development; (b) ensure reasonable and fair compensation for those who suffer injuries as a result of these potentionally dangerous activities.

282. The United States OPA provides for limitation of liability. However, limitation cannot be invoked if, under section 2704 (c) (1), the incident was proximately caused by:

> "(A) the gross negligence or wilful misconduct of, or
>
> (B) the violation of an applicable Federal safety, construction or operating regulation by, 'the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party ..."

283. Under section 2704 (c) (2) of OPA, the responsible party is not entitled to limit its liability if it "fails or refuses":

> "(A) to report the incident as required by law and the responsible party knows or has reason to know of the incident;
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> (B) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or

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259/ International Herald Tribune, 15 June 1982, p. 5, col. 2.

260/ See Canada-Union of Soviet Socialist republics: Protocol on Settlement of Canada's Claim for Damage Caused by "Cosmos 954" in Int'l Legal Mat., vol 20, 1981, p. 689.

(C) without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 1321 of this title or the Intervention on the High Seas Act."

284. The limitation of liability provided under section 2714 (a) may also be lost in accordance with section 2714 (c) by the wilful misconduct or violation of a safety regulation by an employee of the responsible party or by an independent contractor performing services for the responsible party.

285. The United States CERCLA contains, in section 9607 (c) (1), provisions on limitation of liability. This subsection also authorizes the imposition of punitive damages, if a liable person fails without sufficient cause properly to provide removal or remedial action upon order of the President in an amount at least equal to and not more than three time the amount of costs incurred as a result of the failure to take proper action. Like OPA, the right to limit liability is lost if the defendant fails to cooperate or provide assistance to public officials.

286. Section 15 of the 1990 German ELA also provides for limitations of liability.

(a) Treaty practice

287. The 1960 Convention on Third Party Liability in the Field of Nuclear Energy is drafted to deal systematically and uniformly only with the question of liability and compensation in the field of nuclear energy. Article 7 of the Convention limits the liability of the operator. It also provides that the aggregate of compensation required to be paid in respect of damage caused by a nuclear incident shall not exceed the maximum liability established in accordance with the article. 261/

288. Under the 1952 Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, if the total amount of claims established exceeds the limit of liability, they shall be reduced in proportion to their respective amounts in respect of claims exclusively for loss of life or personal injury or exclusively for damage to property. But if the claims concern both loss of life or personal injury and damage to property, one half of the total sum shall be allocated preferentially for loss of life or personal injury. The remainder shall be distributed proportionately among the claims in respect of damage to property and the portion not already covered of the claims in respect of loss of life and personal injury. 262/

261/ Article 7 (a) of the Convention defines the minimum and maximum amounts of compensation:

"(a) The aggregate of compensation required to be paid in respect of damage caused by a nuclear incident shall not exceed the maximum liability established in accordance with this article."

262/ Article 14 of the Convention reads:

"If the total amount of the claims established exceeds the limit of liability applicable under the provisions of this Convention, the following rules shall apply, taking into account

289. The Additional Convention to CIV provides for limitation of liability. However, if the damage is caused by the wilful misconduct or gross negligence of the railway, the limitation of liability is removed. 263/

290. Article 10 of the Convention nullifies any agreement between passengers and the railway in which the liability of the railway is precluded or has been limited to a lower amount than that provided for in the Convention. 264/

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the provisions of paragraph 2 of article 11:

(a) If the claims are exclusively in respect of loss of life or personal injury or exclusively in respect of damage to property, such claims shall be reduced in proportion to their respective amounts.

(b) If the claims are both in respect of loss of life or personal injury and in respect of damage to property, one half of the total sum distributable shall be appropriated preferentially to meet claims in respect of loss of life and personal injury and, if insufficient, shall be distributed proportionately between the claims concerned. The remainder of the total sum distributable shall be distributed proportionately among the claims in respect of damage to property and the portion not already covered of the claims in respect of loss of life and personal injury."

263/ Articles 7 and 8 read:

"Article 7. Limit of damages in case of damage to or loss of articles

When, under the provisions of this Convention, the railway is liable to pay damages for damage to, or for total or partial loss of any articles which the passenger who has sustained an accident had either on him or with him as hand luggage, including any animals which he had with him, compensation for the damage may be claimed up to the sum of 2,000 francs per passenger."

Article 8. Amount of damages in case of wilful misconduct or gross negligence

The provisions of articles 6 and 7 of this Convention or those of the national law which limit compensation to a fixed amount shall not apply if the damage results from wilful misconduct or gross negligence of the railway."

264/ Articles 10 and 12 read:

"Any terms or conditions of carriage or special agreements concluded between the railway and the passenger which purport to exempt the railway in advance, either totally or partially, from liability under this Convention, or which have the effect of reversing the burden of proof resting on the railway, or which provide for limits lower than those laid down in article 6 (2) and article 7, shall be null and void. Such nullity shall not, however, avoid the contract of carriage which shall remain subject

291. The preamble to the 1957 International Convention relating to the Limitation of the Liability of Owners of Seagoing Ships clearly indicates the objectives of the contracting parties as:

> "Having recognized the desirability of determining by agreement certain uniform rules relating to the limitation of liability of owners of seagoing ships;
>
> Having decided to conclude a Convention for this purpose ..."

292. Article 1 of the Convention only reiterates the preamble. Under paragraph 3 of article 1, the limitation of liability of the seagoing ship will cease if it is proved that the injury was caused by the negligence of the shipowner or of persons for whose conduct he is responsible. The question upon whom lies the burden of proving whether there has been a fault is to be determined by the law of the forum.

293. The 1969 Civil Liability Convention Against Oil Pollution Damage also provides for limitation of liability. In accord with article 5 of the Convention, the ship owner is entitled to limit his liability in respect of any one incident to an aggregate amount of 2,000 francs for each ton of the ship's tonnage. The amount of limitation of liability was viewed as too low. The Convention was therefore amended by the 1984 protocol to increase the maximum amount of compensation available in case of oil pollution and and was intended to attract some States in particular the United States to join the protocol. The 1984 Protocol is not concerned with distribution of liability and relief for ship owners because of the substantial rise in the limits. The 1984 Protocol deletes all references to ship owners indemnification. Article 6 of the Protocol amended paragraph 2 of article 5 of the 1969 Convention by providing that:

> "The owner shall not be entitled to limit his liability under this Convention if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result." 265/

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to the provisions of CIV and this Convention.

Article 12. Bringing of actions not within the provisions of this Convention

No action of any kind shall be brought against a railway in respect of its liability under article 2 (1) of this Convention, except subject to the conditions and limitations laid down in this Convention.

The same shall apply to any action brought against persons for whom the railway is liable under article 11."

265/ IMO, LEG/CONF.6/66. Emphasis added.

294. However, in March 1989 when the Exxon Valdez ran aground in Prince William Sound, Alaska, it unleashed strong public reaction. This lead to a decision by the United States Congress to reject the Protocol and to enact the Oil Pollution Act of 1990 which introduces limits on liability substantially higher than the 1984 Protocol and also provides unlimited liability in more circumstances than the 1984 Protocol, such as in situations of gross negligence, wilful misconduct and violations of applicable federal regulations. 266/

295. The liability of the operator is also limited under article 6 of the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources. Under paragraph 4 of the same article, the operator will not be entitled to limit his liability if it is proved that the pollution damage occurred as a result of an act or omission of the operator himself, done deliberately with actual knowledge that pollution damage will result. Two elements are thus required to remove the limitation on liability: one is an act or omission of the operator, and the second is actual knowledge that pollution damage will result. Hence the negligence of the operator does not, under this Convention, remove the limitation on liability.

296. The CRTD limits the liability of the carrier (art. 9). This limitation of liability is not applicable if, under article 10 of the Convention, "it is proved that the damage resulted from his personal act or omission or an act or omission of his servants or agents, committed with the intent to cause such damage or recklessly and with knowledge that such damage would probably result, provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment." Article 13 of the Convention requires compulsory insurance from the carrier which should be equivalent to the maximum amount of liability. 267/ Article 14 provides that every State Party shall designate one or several competent authorities to issue or approve certificates attesting that the carrier has valid insurance.

266/ Birinie and Boyle, op. cit, p. 296.

267/ Article 13 of the Convention reads:

"1. The carrier's liability shall be covered by insurance or other financial security, such as a bank guarantee, if the dangerous goods are carried in the territory of a State Party.

2. The insurance or other financial security shall cover the entire period of the carrier's liability under this Convention in the sums fixed by applying the limits of liability prescribed in article 9 and shall cover the liability of the person named in the certificate as carrier or, if that person is not the carrier as defined in article 1, paragraph 8, of such person as does incur liability under this Convention.

3. Any sums provided by insurance or by other financial security maintained in accordance with paragraph 1 of this article shall be available only for the satisfaction of claims under this Convention."

297. The draft international convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea also provides, in article 6, for limitation of liability along the lines of article V of the International Convention on Civil Liability for Oil Pollution Damage. Article 10 of HNS follows article VII of the 1969 Convention of Civil Liability Against Oil Pollution Damage requiring compulsory insurance of the owner. NHS also anticipates a financial scheme to guarantee the payment of full compensation. The Fund scheme is similar to the scheme established by the draft protocol to the Basel Convention which does not provide any limitation to liability. Article 5 of the draft protocol provides that there shall be no fixed financial limit to liability.

298. The original draft of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment contained a provision on limitation of liability. This provision was deleted in the final draft.

(b) Judicial decisions and State practice outside treaties

299. Judicial decisions and official correspondence reveal no limitation on compensation other than that agreed upon in treaties. Some references have been made to equitable, fair and adequate compensation. By a broad interpretation, limitation on compensation may sometimes be compatible with equitable and fair compensation.

B. AUTHORITIES COMPETENT TO AWARD COMPENSATION

300. Paragraph 1 of Article 33 of the Charter of the United Nations provides a wide choice of peaceful modes of dispute settlement from the most informal to the most formal:

> "1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

301. State practice reveals that these modes of settlement of disputes have been utilized to resolve questions of liability and compensation relating to acts with extraterritorial injurious consequences. International courts, arbitral tribunals, joint commissions as well as domestic courts have decided on those questions. Generally, on the basis of prior agreements among States, the Permanent Court of International Justice, the International Court of Justice and arbitral tribunals have dealt with disputes relating to the utilization of and activities on the continental shelf, in the territorial sea, etc. When there have been ongoing activities, usually among neighbouring States, such as the use of shared waters, for which there are established institutions constituted by States, claims arising from these activities have normally been referred to the joint institution or commission concerned. Domestic courts have been used on issues involving civil liability and in particular the liability of the operator.

1. Local courts and authorities

(a) Treaty practice

302. A number of multilateral agreements designate local courts and authorities as competent to decide on questions of liability and compensation. With regard to activities, primarily of a commercial nature, in which the actors are private entities and the primary liability is that of the operator, local courts have been recognized as appropriate decision makers. This is typical of the civil liability conventions. For example, the 1960 Convention on Third Party Liability in the Field of Nuclear Energy confers jurisdiction only on the courts of the contracting State in whose territory the nuclear installation of the operator liable is located. When the nuclear incident occurs during transportation, jurisdiction lies, unless otherwise provided, with the courts of the contracting State in whose territory the nuclear substances involved were at the time of the incident. Article 13 of the Convention indicates in detail how jurisdiction is divided among the domestic courts of the contracting parties, according to the place of occurrence of the nuclear incident.

303. Under article VIII of the 1963 Vienna Convention on Civil Liability for Nuclear Damage, the nature, form and extent of compensation, as well as its equitable distribution, are governed by the competent courts of the contracting parties:

> "Subject to the provisions of this Convention, the nature, form and extent of the compensation, as well as the equitable distribution thereof, shall be governed by the law of the competent court."

304. The Convention further provides, in article XI, that jurisdiction lies with the domestic courts of the contracting party in whose territory the nuclear incident occurs and that, if the incident occurs outside the territory of any contracting party, or if the place of the incident cannot be determined, the courts of the Installation State of the operator liable have jurisdiction.

305. Article X of the 1962 Convention on the Liability of Operators of Nuclear Ships provides that action for compensation shall be brought either before the courts of the licensing State or before the courts of the contracting State or States in whose territory nuclear damage has been sustained.

306. Under the 1969 International Convention on Civil Liability for Oil Pollution Damage, only the courts of the contracting State or States in whose territory, including the territorial sea, the pollution damage has occurred, or preventive measures have been taken to prevent or minimize damage, are to entertain claims for compensation. Thus each contracting State has to ensure that its courts possess the necessary jurisdiction. Once a fund has been established in accordance with the requirements of article V of the Convention, the courts of the State where the fund is established have exclusive jurisdiction to decide on all matters relating to its apportionment and distribution.

307. Under article XI of the Convention, the domestic courts also have jurisdiction in respect of ships owned by a contracting State and used for commercial purposes.

308. Similarly, the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage provides that the domestic courts of the contracting parties are competent to decide on actions against the Fund, and that the contracting States must endow their courts with the necessary jurisdiction to entertain such actions.

309. The Additional Convention to CIV provides that, unless otherwise agreed upon by States, or stipulated in the license of the railway, the domestic courts of the State in whose territory the accident to the passenger occurs are competent to entertain actions for compensation. Article 15 of the Convention reads:

> "Actions brought under this Convention may only be instituted in the competent court of the State on whose territory the accident to the passenger occurred, unless otherwise provided in agreements between States, or in any license or other document authorizing the operation of the railway concerned."

310. Under the 1974 Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden, the nuisance which an activity entails or may entail in the territory of another contracting State is equated with a nuisance in the State where the activity is carried out. Thus any person who is or may be affected by such a nuisance may bring a claim before the court or administrative authority of that State for compensation. The rules on compensation must not be less favourable to the injured party than those in the State where the activity is carried out. Indeed, the Convention provides for equal access to the competent authorities and for equal treatment of the injured parties, whether local or foreign. 268/

268/ The relevant articles of the Convention read:

"Article 2

In considering the permissibility of environmentally harmful activities, the nuisance which such activities entail or may entail in another Contracting State shall be equated with a nuisance in the State where the activities are carried out.

Article 3

Any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State shall have the right to bring before the appropriate court or administrative authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage, and to appeal against the decision of the court or the administrative authority to the same extent and on the same terms as a legal entity of the State in which the activities are being carried out.

The provisions of the first paragraph of this article shall be equally applicable in the case of proceedings concerning compensation for damage caused by environmentally harmful activities. The question of compensation shall not be judged by rules which are less favourable to the injured party than the rules of compensation of the State in which

311. Under article 11 of the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources, the authorities competent to decide on questions of liability and compensation are the national courts of either the controlling State or the State in whose territory the damage has occurred. Each contracting party is required to ensure that its courts possess the necessary jurisdiction to entertain actions for compensation. It appears, under the Convention, that the national courts are to apply both the Convention and their domestic law, the former for questions of liability and compensation and the latter for evidentiary and procedural matters. However, only the courts of a State party in which a fund has been constituted are competent to determine all matters relating to the apportionment and distribution of that fund. Furthermore, if a well has been abandoned in circumstances other than those provided in the Convention, the liability of the operator in accordance with paragraph 4 of article 3 is governed by the applicable domestic law.

312. In accordance with article 232 of the 1982 United Nations Convention on the Law of the Sea, States are liable for damage or loss attributable to them arising from measures taken in accordance with section 6 of part XII, relating to the protection and preservation of the marine environment, when such measures are unlawful or exceed those reasonably required. Accordingly, States are required to endow their courts with appropriate jurisdiction to deal with actions brought in respect of such loss or damage.

313. The 1988 Antarctic Convention provides that rules and procedures in respect of liability shall be elaborated through a separate protocol. That protocol has not yet been adopted (art. 8 (7)). Each State Party to the Convention, is required, under paragraph 10 of article 8, pending the adoption of the protocol, to ensure that:

> "... recourse is available in its national courts for adjudicating liability claims pursuant to paragraphs 2, 4 and 6 above against Operators which are engaged in prospecting. Such recourse shall include the adjudication of claims against any Operator it has sponsored ... "

314. Paragraph 11 of article 8 of the Convention provides that nothing in that article shall be construed so as to preclude the application of existing or future international rules on liability of either the State or the operator.

315. Under article 19 of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, actions for compensation may be brought only within a State Party at the court of the

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the activities are being carried out.

Protocol

...

The right established in article 3 for anyone who suffers injury as a result of environmentally harmful activities in a neighbouring State to institute proceedings for compensation before a court or administrative authority of that State shall, in principle, be regarded as including the right to demand the purchase of his real property."

place: "(a) where the damage was suffered; or (b) where the dangerous activity was conducted; or (c) where the defendant has his habitual residence". In accordance with article 21 of the same Convention, when proceedings involving the same course of action and between the same parties are brought in the courts of different States parties, any court other than the court first seized shall, of its own motion, stay its proceedings until the jurisdiction of the court first seized is established and when such jurisdiction is established, other courts shall decline jurisdiction.

316. Under article 19 of the Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods, actions for compensation may only be brought in the courts of any State Party "(a) where the damage was sustained as a result of the incident; or (b) where the incident occurred; or (c) where preventive measures were taken to prevent or minimize damage; or (d) where the carrier has his habitual residence". The article also requires that each Contracting State shall ensure that its courts possess the necessary jurisdiction to entertain such actions for compensation.

317. Under article 10 of the draft protocol to the Basel Convention, claims for compensation may only be brought in the courts of a Contracting Party where either the damage was sustained, or the damage has its origin, or the person alleged to be liable resides, is domiciled or has his principal place of business.

(b) Judicial decisions and State practice outside treaties

318. The existing judicial decisions and official correspondence contain no indication concerning the competence of local courts and authorities to rule on questions of liability and compensation, except possibly on the distribution of lump sum payments.

2. International courts, arbitral tribunals and joint commissions

(a) Treaty practice

319. In the case of activities not exclusively of a commercial nature, in which the acting entities are primarily States, the competent organs for deciding on questions of liability and compensation are generally arbitral tribunals. The 1972 Convention on International Liability for Damage Caused by Space Objects provides that, if the parties fail to reach agreement through diplomatic negotiations, the question of compensation shall be submitted to arbitration. Accordingly a claims commission composed of three members, one

appointed by the claimant State, one appointed by the launching State and a chairman, is to be established upon the request of either party. 269/

269/ The relevant articles of the Convention read:

"Article VIII

1. A State which suffers damage, or whose natural or juridical persons suffer damage, may present to a launching State a claim for compensation for such damage.

2. If the State of nationality has not presented a claim, another State may, in respect of damage sustained in its territory by any natural or juridical person, present a claim to a launching State.

3. If neither the State of nationality nor the State in whose territory the damage was sustained has presented a claim or notified its intention of presenting a claim, another State may, in respect of damage sustained by its permanent residents, present a claim to a launching State.

Article IX

A claim for compensation for damage shall be presented to a launching State through diplomatic channels. If a State does not maintain diplomatic relations with the launching State concerned, it may request another State to present its claim to that launching State or otherwise represent its interests under this Convention. It may also present its claim through the Secretary-General of the United Nations, provided the claimant State and the launching State are both Members of the United Nations.

Article XI

1. Presentation of a claim to a launching State for compensation for damage under this Convention shall not require the prior exhaustion of any local remedies which may be available to a claimant State or to natural or juridical persons it represents.

2. Nothing in this Convention shall prevent a State, or natural or juridical persons it might represent, from pursuing a claim in the courts or administrative tribunals or agencies of a launching State. A State shall not, however, be entitled to present a claim under this Convention in respect of the same damage for which a claim is being pursued in the courts or administrative tribunals or agencies of a launching State or under another international agreement which is binding on the States concerned.

...

Article XIV

If no settlement of a claim is arrived at through diplomatic negotiations as provided for in article IX, within one year from the date

320. In part XV of the 1982 United Nations Convention on the Law of the Sea, the parties are encouraged and requested to settle their disputes by peaceful means. The Convention provides for a wide range of possible modes of settlement of disputes, as well as for an elaborate system according to which the competent organs for deciding a dispute, depending upon the nature of the dispute, are the International Tribunal for the Law of the Sea, or the International Court of Justice, or an arbitral tribunal. Articles 278 to 285 set out the modes of settlement compatible with Article 33 of the Charter.

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on which the claimant State notifies the launching State that is has submitted the documentation of its claim, the parties concerned shall establish a Claims Commission at the request of either party.

Article XV

1. The Claims Commission shall be composed of three members: one appointed by the claimant State, one appointed by the launching State and the third member, the chairman, to be chosen by both parties jointly. Each party shall make its appointment within two months of the request for the establishment of the Claims Commission.

2. If no agreement is reached on the choice of the chairman within four months of the request for the establishment of the Commission, either party may request the Secretary-General of the United Nations to appoint the chairman within a further period of two months.

Article XVI

1. If one of the parties does not make its appointment within the stipulated period, the chairman shall, at the request of the other party, constitute a single member Claims Commission.

2. Any vacancy which may arise in the Commission for whatever reason shall be filled by the same procedure adopted for the original appointment.

3. The Commission shall determine its own procedure.

4. The Commission shall determine the place or places where it shall sit and all other administrative matters.

5. Except in the case of decisions and awards by a single member Commission, all decisions and awards of the Commission shall be by majority vote.

...

Article XVIII

The Claims Commission shall decide the merits of the claim for compensation and determine the amount of compensation payable, if any."

(b) Judicial decisions and State practice outside treaties

321. Most judicial decisions in this matter have been rendered by the Permanent Court of International Justice, by the International Court of Justice or by arbitral tribunals on the basis of an agreement between the parties or of a prior treaty obligation. At least one arbitral tribunal, that called upon to adjudicate in the Trail Smelter case, provided in its award for an arbitration mechanism in the event that the States parties were unable to agree on the modification or amendment of the regime proposed by one side.

3. Applicable law

(a) Treaty practice

322. The 1972 Convention on International Liability for Damage Caused by Space Objects regulates space activities at present controlled by States. It provides that international law and the principles of justice and equity are the applicable law in accordance with which compensation and such reparation in respect of the damage as will restore the person, natural or juridical, shall be determined. 270/

323. Similarly, article 293 of the 1982 United Nations Convention on the Law of the Sea provides that, a court (that is the International Court of Justice or the International Tribunal for the Law of the Sea) or a tribunal having jurisdiction, in accordance with section 2 of part XV of the Convention, to rule in a dispute concerning the application or interpretation of the Convention, shall apply the provisions of the Convention and other rules of international law not incompatible with the Convention. However, if the parties to a dispute agree, the court or tribunal can adjudicate ex aequo et bono.

324. On the other hand, the Additional Convention to CIV which regulates an essentially commercial activity, provides in article 6 paragraph 2, for the application of national law. 271/

270/ Article XII of the Convention reads:

"The compensation which the launching State shall be liable to pay for damage under this Convention shall be determined in accordance with international law and the principles of justice and equity in order to provide such reparation in respect of the damage as will restore the person, natural or juridical, State or international organization on whose behalf the claim is presented to the condition which would have existed if the damage had not occurred".

271/ Article 6 (2) reads:

"2. The amount of damages to be awarded under paragraph 1 shall be determined in accordance with national law. However, in the event of the national law providing for a maximum limit of less than 200,000 francs, the limit per passenger shall, for the purposes of this Convention, be fixed at 200,000 francs in the form of a lump sum or of an annuity corresponding to that amount."

325. Similarly, the 1962 Convention on the Liability of Operators of Nuclear Ships provides in article VI for the application of national laws. 272/

326. Under article 5, paragraph 5, of the 1957 International Convention relating to the Limitation of the Liability of Owners of Seagoing Ships, claims for liability and compensation are to be brought before the appropriate national courts of the contracting parties. In addition the time limit within which such claims may be brought or prosecuted shall be decided in accordance with the national law of the contracting State in which the claim is brought.

327. The Convention further provides, in article I, paragraph 6 that the national law shall determine the question upon whom lies the burden of proving whether or not the accident causing the injury resulted from a fault.

328. The Convention on the Law Applicable to Products Liability of 2 October 1973 which is intended to resolve the issue of jurisdiction and applicable law regarding litigations on products liability provides for the application of the internal law of the State of the place of injury, if that State is also:

> "(a) the place of the habitual residence of the person directly suffering damage, or
>
> (b) the principal place of business of the person claimed to be liable, or
>
> (c) the place where the product was acquired by the person directly suffering damage."

329. Article 5 of the same Convention provides that notwithstanding the provisions of Article 4, the applicable law shall be the internal law of the State of the habitual residence of the person directly suffering damage, if that State is also:

> "(a) the principle place of business of the person claimed to be liable, or

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272/ Article VI of the Convention reads:

> "Where provisions of national health insurance, social insurance, social security, workmen's compensation or occupational disease compensation systems include compensation for nuclear damage, rights of beneficiaries under such systems and rights of subrogation or of recourse against the operator, by virtue of such systems, shall be determined by the law of the Contracting State having established such systems. However, if the law of such contacting State allows claims of beneficiaries of such systems and such rights of subrogation and recourse to be brought against the operator in conformity with the terms of this Convention, this shall not result in the liability of the operator exceeding the amount specified in paragraph 1 of article III."

(b) the place where the product was acquired by the person directly suffering damage."

330. Under article 6 of the same Convention, where neither of the laws designated in articles 4 and 5 applies, the applicable law shall be the internal law of the State of the principal place of business of the person claimed to be liable, unless the claimant bases his claim upon the internal law of the State of the place of injury.

331. Article 11 of the draft Protocol to the Basel Convention provides that all matters of substance or procedure regarding claims brought in a competent court which are not specifically regulated in the Protocol shall be governed by the law of that court, including any rules of such law regarding conflict of jurisdiction.

(b) Judicial decisions and State practice outside treaties

332. Under Article 38 of the Statute of the Permanent Court of International Justice as well as of the International Court of Justice, the function of the Court is to decide such disputes as are submitted to it in accordance with international law, the sources of which are:

"(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

333. Under this article, if the parties agree, the Court has the competence to decide their case ex aequo et bono. It is within this legal framework that international courts have adjudicated on issues of extraterritorial injuries and liability.

334. The decisions of arbitral tribunals have also been based on the treaty obligations of the contracting parties, on international law, and occasionally on the domestic law of States. In the Trail Smelter case, the tribunal examined the decisions of the United States Supreme Court as well as other sources of law and reached the conclusion that "under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another ...".

335. In their official correspondence, States have invoked international law and the general principles of law, as well as treaty obligations. Canada's claim for damages for the crash of the former Soviet satellite Cosmos 954 was based on treaty obligations as well as the "general principles of law

reccgnized by civilized nations". Regional principles or standards of behaviour have also been considered relevant in relations between States. The principles accepted in Europe concerning the obligation of States whose activities may be injurious to their neighbours to negotiate with them were invoked by the Netherlands Government in 1973 when the Belgian Government announced its intention to build a refinery near its frontier with the Netherlands. Similarly, in an official letter to Mexico concerning the protective measures taken by that country to prevent flooding, the United States Government referred to the "principle of international law" which obligates every State to respect the full sovereignty of other States.

336. In their decisions, domestic courts, in addition to citing domestic law, have referred to the applicability of international law, the principles of international comity, etc. For example, the German Constitutional Court, in rendering a provisional decision concerning the flow of the waters of the Danube in the Donauversinkung case (1927), raised the question of accountability, under international law, of acts of interference with the flow of the waters. It stated that "only considerable interference with the natural flow of international rivers can form the basis for claims under international law". Again, in the Roya case (1939), the Italian Court of Cassation referred to international obligations. It stated that a State "cannot disregard the international duty ... not to impede or to destroy ... the opportunity of the other States to avail themselves of the flow of water for their own national needs". Finally, in its judegment in the United States v. Arjona case (1887), the United States Supreme Court invoked the law of nations which "requires every national Government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation ...".

CHAPTER V. STATUTE OF LIMITATIONS

337. Under article 17 of the Convention on Civil Liability for Damage caused During Carriage of Dangerous Goods by Roads, the claimant must bring a claim against the carrier or its guarantor within three years from the date at which the person suffering the damage knew or ought reasonably to have known of the damage and of the identity of the carrier. This period may be extended, if the parties so agree after the incident. However, in no case shall an action be brought after 10 years from the date of the incident which caused the damage.

338. Article 18 of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment provides a limitation of three years from the date on which the claimant knew or ought reasonably to have known of the damage and of the identity of the operator. However, in no case shall actions be brought after 30 years from the date of the incident which caused the damage. Where the incident consists of a series of occurrences, the 30 years shall run from the date of the last of such occurrences. In respect of a site for the permanent deposit of waste, the 30 years shall, at the latest, run from the date on which the site was closed in accordance with the internal law.

339. Under article 10 of the Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for Exploitation of Seabed Mineral Resources, rights of compensation shall be extinguished within 12 months of the date on which the injured party knew or should reasonably have known of the damage:

> "Rights of compensation under this Convention shall be extinguished unless, within 12 months of the date on which the person suffering the damage knew or ought reasonably to have known of the damage, the claimant has in writing notified the operator of his claim or has brought an action in respect of it. However in no case shall an action be brought after four years from the date of the incident which caused the damage. Where the incident consists of a series of occurrences, the four years' period shall run from the date of the last occurrence".

340. In certain circumstances, the liability of the operator or of the State may be precluded. Some multilateral conventions provide for exoneration. The typical exoneration is that which results from prescription. Article 21 of the 1952 Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface provides that actions under the Convention are limited to two years from the date of the incident. Any suspension or interruption of these two years is determined by the law of the court where the action is brought. Nevertheless, the maximum time for bringing an action may not extend beyond three years from the date of the accident. 273/

273/ The article reads:

> "1. Actions under this Convention shall be subject to a period of limitation of two years from the date of the incident which caused the damage.

341. Articles 16 and 17 of the Additional Convention to CIV, provide for a period of time after which a right of action will be extinguished. 274/

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2. The grounds for suspension or interruption of the period referred to in paragraph 2 of this article shall be determined by the law of the court trying the action; but in any case the right to institute an action shall be extinguished on the expiration of three years from the date of the incident which caused the damage."

274/ These articles read:

"Article 16. Extinction of rights of action

1. A claimant shall lose right of action if he does not give notice of the accident to a passenger to one of the railways to which a claim may be presented in accordance with article 13 within three months of his becoming aware of the damage.

When notice of the accident is given orally by the claimant, confirmation of this oral notice must be delivered to the claimant by the railway to which the accident has been notified.

2. Nevertheless the right of action shall not be extinguished:

(a) if, within the period of time provided for in paragraph 1, the claimant has made a claim to one of the railways designated in article 13 (1);

(b) if the claimant proves that the accident was caused by the wrongful act or neglect of the railway;

(c) if notice of the accident has not been given, or has been given late, as a result of circumstances for which the claimant is not responsible;

(d) if during the period of time specified in paragraph (1), the railway responsible - or one of the two railways if in accordance with article 2 (6) two railways are responsible - knows of the accident to the passenger through other means.

Article 17. Limitation of actions

1. The limitation of actions for damages brought under this Convention shall be:

(a) in the case of the passenger who has sustained an accident, three years from the day after the accident;

(b) in the case of other claimants, three years from the day after the death of the passenger, or five years from the day after the accident, whichever is the earlier.

342. The 1962 Convention on the Liability of Operators of Nuclear Ships provides for a 10-year period of prescription from the date of the nuclear incident. The domestic law of the licensing State may provide for a longer period. 275/

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2. When a claim is made to the railway in accordance with article 13, the three periods of limitation provided for in paragraph 1 shall be suspended until such date as the railway rejects the claim by notification in writing, and returns the document attached thereto. If part of the claim is admitted, the period of limitation shall start to run again only in respect of that part of the claim still in dispute. The burden of proof of the receipt of the claim or of the reply and of the return of the documents, shall rest with the party relying upon these facts.

The running of the period of limitation shall not be suspended by further claims having the same object.

3. A right of action which has become barred by lapse of time may not be exercised even by way of counterclaim or set-off.

4. Subject to the foregoing provisions, the limitation of actions shall be governed by national law."

275/ Article V of the Convention reads:

"1. Rights of compensation under this Convention shall be extinguished if an action is not brought within 10 years from the date of the nuclear incident. If, however, under the law of the licensing State the liability of the operator is covered by insurance or other financial security or State indemnification for a period longer than 10 years, the applicable national law may provide that rights of compensation against the operator shall only be extinguished after a period which may be longer than 10 years but shall not be longer than the period for which his liability is so covered under the law of the licensing State. However, such extension of the extinction period shall in no case affect the right of compensation under this Convention of any person who has brought an action for loss of life or personal injury against the operator before the expiry of the aforesaid period of 10 years.

2. Where nuclear damage is caused by nuclear fuel, radioactive products or waste which were stolen, lost, jettisoned, or abandoned, the period established under paragraph 1 of this article shall be computed from the date of the nuclear incident causing the nuclear damage, but the period shall in no case exceed a period of 20 years from the date of the theft, loss, jettison or abandonment.

3. The applicable national law may establish a period of extinction or prescription of not less than three years from the date on which the person who claims to have suffered nuclear damage had knowledge or ought reasonably to have had knowledge of the damage and of the person responsible for the damage, provided that

343. A 10-year period of prescription is also provided for in the 1963 Vienna Convention on Civil Liability for Nuclear Damage. 276/

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the period established under paragraphs 1 and 2 of this article shall not be exceeded.

4. Any person who claims to have suffered nuclear damage and who has brought an action for compensation within the period applicable under this article may amend his claim to take into account any aggravation of the damage, even after the expiry of that period, provided that final judgment has not been entered".

276/ Article VI of the Convention reads:

"1. Rights of compensation under this Convention shall be extinguished if an action is not brought within ten years from the date of the nuclear incident. If, however, under the law of the Installation State, the liability of the operator is covered by insurance or other financial security or by State funds for a period longer than 10 years, the law of the competent court may provide that rights of compensation against the operator shall only be extinguished after a period which may be longer than 10 years, but shall not be longer than the period for which his liability is so covered under the law of the Installation State. Such extension of the extinction period shall in no case affect rights of compensation under this Convention of any person who has brought an action for loss of life or personal injury against the operator before the expiry of the aforesaid period of 10 years.

2. Where nuclear damage is caused by a nuclear incident involving nuclear material which at the time of the nuclear incident was stolen, lost, jettisoned or abandoned, the period established pursuant to paragraph 1 of this article shall be computed from the date of that nuclear incident, but the period shall in no case exceed a period of 20 years from the date of the theft, loss, jettison or abandonment.

3. The law of the competent court may establish a period of extinction or prescription of not less than three years from the date on which the person suffering nuclear damage had knowledge or should have had knowledge of the damage and of the operator liable for the damage, provided that the period established pursuant to paragraphs 1 and 2 of this article shall not be exceeded."

344. The same period of prescription is provided for in the 1960 Convention on Third Party Liability in the Field of Nuclear Energy. 277/

277/ Articles 8 and 9 of the Convention read:

"Article 8

(a) The right of compensation under this Convention shall be extinguished if an action is not brought within 10 years from the date of the nuclear incident. National legislation may, however, establish a period longer than 10 years if measures have been taken by the Contracting Party in whose territory the nuclear installation of the operator liable is situated to cover the liability of that operator in respect of any actions for compensation begun after the expiry of the period of 10 years and during such longer period: provided that such extension of the extinction period shall in no case affect the right of compensation under this Convention of any person who has brought an action in respect of loss of life or personal injury against the operator after the expiry of the period of 10 years.

(b) In the case of damage caused by a nuclear incident involving nuclear fuel or radioactive products or waste which, at the time of the incident have been stolen, lost, jettisoned or abandoned and have not yet been recovered, the period established pursuant to paragraph (a) of this article shall be computed from the date of that nuclear incident, but the period shall in no case exceed 20 years from the date of the theft, loss, jettison or abandonment.

(c) National legislation may establish a period of not less than two years from the extinction of the right or as a period of limitation either from the date at which the person suffering damage has knowledge or from the date at which he ought reasonably to have known of both the damage and the operator liable: provided that the period established pursuant to paragraphs (a) and (b) of this article shall not be exceeded.

(d) Where the provisions of article 13 (c) (ii) are applicable, the right of compensation shall not, however, be extinguished if, within the time provided for in paragraph (a) of this article:

(i) prior to the determination by the Tribunal referred to in article 17, an action has been brought before any of the courts from which the Tribunal can choose; if the Tribunal determines that the competent court is a court other than that before which such action has already been brought, it may fix a date by which such action has to be brought before the competent court so determined; or

(ii) a request has been made to a Contracting Party concerned to initiate a determination by the Tribunal of the competent court pursuant to article 13 (c) (ii) and an action is brought subsequent to such determination within such time as may be fixed by the Tribunal.

345. The 1972 Convention on International Liability for Damage Caused by Space Objects provides for a one-year limit for bringing actions for damages. The one year runs from the occurrence of the damage or from the identification of the launching State which is liable. This latter period, however, shall not exceed one year following the date by which the State could reasonably be expected to have learned of the facts. 278/

346. An action for damages may be brought within three years from the date of the occurrence of the damage under the 1969 International Convention on Civil

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(e) Unless national law provides to the contrary, any person suffering damage caused by a nuclear incident who has brought an action for compensation within the period provided for in this article may amend his claim in respect of any aggravation of the damage after the expiry of such period provided that final judgement has not been entered by the competent court.

Article 9

The operator shall not be liable for damage caused by a nuclear incident directly due to an act of armed conflict, hostilities, civil war, insurrection or, except in so far as the legislation of the Contracting Party in whose territory his nuclear installation is situated may provide to the contrary, a grave natural disaster of an exceptional character."

278/ Article X of the Convention reads:

"1. A claim for compensation for damage may be presented to a launching State not later than one year following the date of the occurrence of the damage or the identification of the launching State which is liable.

2. If, however, a State does not know of the occurrence of the damage or has not been able to identify the launching State which is liable, it may present a claim within one year following the date on which it learned of the aforementioned facts; however, this period shall in no event exceed one year following the date on which the State could reasonably be expected to have learned of the facts through the exercise of due diligence.

3. The time-limits specified in paragraphs 1 and 2 of this article shall apply even if the full extent of the damage may not be known. In this event, however, the claimant State shall be entitled to revise the claim and submit additional documentation after the expiration of such lime-limits until one year after the full extent of the damage is known".

Liability for Oil Pollution Damage. No action may be brought after six years from the date of the incident which caused damage. 279/

347. The provisions of this Convention do not apply to warships or other ships owned or operated only for governmental and non-commercial service. 280/

348. An identical period of prescription is stipulated in article 6 of the 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.

349. Article 6 of the draft protocol to the Basel Convention provides that claims for compensation shall be filed within five years from the date at which the claimant knew or should reasonably have known of damage, its sources and the person responsible therefor. In no case shall a claim for compensation be accepted after 30 years from the date of the incident.

279/ Article VIII of the Convention reads:

"Rights of compensation under this Convention shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage. Where this incident consists of a series of occurrences, the six years' period shall run from the date of the first such occurrence."

280/ Paragraph 1 of article XI reads:

"1. The provisions of this Convention shall not apply to warships or other ships owned or operated by a State and used, for the time being, only on government non-commercial service.

..."

CHAPTER VI. INSURANCE AND OTHER ANTICIPATORY FINANCIAL SCHEMES TO GUARANTEE COMPENSATION

350. When it is decided to permit the performance of certain activities, with the knowledge that they may cause injuries, it has generally been considered necessary to provide, in advance, for guarantees of payment of damages. This means that the operator of certain activities must either take out an insurance policy or provide financial security. Such requirements are similar to those stipulated in the domestic laws of a number of States in connection with the operation of complex industries, as well as with more routine activities such as driving a car.

351. For example, Section 2716 (a) of the OPA of the United States provides that owners and operators of vessels and oil production facilities must provide evidence of financial responsibility to meet the maximum amount of liability to which the responsible party could be subjected. Under Section 2716 (b), if such evidence of financial responsibility is not provided, the vessel's clearance will be revoked, or the vessel will not be given an entry permit in the United States. Any vessel subject to this requirement which is found in navigable waters without the necessary evidence of financial responsibility for the vessel shall be subject to seizure by and forfeiture to the United States. Under Section 2716 (e), the financial responsibility requirement may be satisfied by evidence of insurance, surety bond, guarantee, letter of credit, qualification as a self-insurer or other evidence of financial responsibility. The requirement of section 2716 of OPA applies also in relation to FWPCA.

352. Under Section 2716 (f) of OPA any claim for removal costs or damages authorized under the Act may be brought directly against the guarantor of the responsible party. The guarantor may assert against the claimant all rights and defences which would be available to a responsible party including the defence that the incident was caused by the wilful misconduct of the responsible party. The guarantor, however, may not defend against the claim even if the responsible party has obtained insurance through fraud or misrepresentation.

353. Similarly, CERCLA requires, in Section 9608, proof of financial responsibility which may be established by insurance, guarantee, surety bond, or qualification as a self-insured. If the owner or the operator fails to provide the required guarantee, the clearance requirement will be withheld or revoked, and entry to any port or place or navigable waters in the United States will be denied or the vessel will be detained.

354. Section 9608 (c) authorizes direct action against the guarantor. Like OPA, the guarantor may invoke the defence that the incident was caused by the wilful misconduct of the owner or operator. Under Section 9608 (d), a guarantor's liability is limited to the amount of the insurance policy, etc. However, this statute does not bar additional recovery under any other State or federal statute, contractual, or common law liability of a guarantor, including liability for bad faith in negotiating or failing to negotiate the settlement of a claim. 281/

281/ See Robert Force, op. cit., p. 43.

355. The ELA of Germany lists, in Appendix 2, three types of facilities which should provide evidence of financial capacity to provide compensation in case of liability under the Act. The requirements of such evidence of financial capacity will be satisfied under article 19 of the Act by one of following: (1) to purchase insurance; (2) to obtain a hold harmless or indemnity guarantee from the State or the federal government; or (3) to obtain such a guarantee from specific credit institutions. 282/

A. TREATY PRACTICE

356. Some multilateral treaties include provisions to ensure the payment of compensation in case of harm and liability. Most multilateral agreements concerning nuclear activities are in this category. Thus, they require the maintenance of insurance or other financial security for the payment of damages in case of liability. The 1962 Convention on the Liability of Operators of Nuclear Ships requires the maintenance of such security. The terms and the amount of the insurance carried by the operator of nuclear ships are determined by the licensing State. Although the licensing State is not required to carry insurance or to provide other financial security, it must "ensure" the payment of claims for compensation for nuclear damage if the operator's insurance or security proves to be inadequate. 283/

357. Similar requirements are stipulated in article VII of the 1963 Vienna Convention on Civil Liability for Nuclear Damage. The operator is required to maintain an insurance or other financial security required by the installation State. While the installation State is not required to carry insurance or to provide other financial security to cover the injuries that may be caused by

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282/ See Hoffman, op. cit., p. 39.

283/ The relevant paragraphs of article III of the Convention read:

"1. The liability of the operator as regards one nuclear ship shall be limited to 1,500 million francs in respect of any one nuclear incident, notwithstanding that the nuclear incident may have resulted from any fault or privity of that operator; such limit shall include neither any interest nor costs awarded by a court in actions for compensation under this Convention.

2. The operator shall be required to maintain insurance, or other financial security covering his liability for nuclear damage, in such amount, of such type and in such terms as the licensing State shall specify. The licensing State shall ensure the payment of claims for compensation for nuclear damage established against the operator by providing the necessary funds up to the limit laid down in paragraph 1 of this article to the extent that the yield of the insurance of the financial security is inadequate to satisfy such claims.

3. However, nothing in paragraph 2 of this article shall require any Contracting State or any of its constituent subdivisions, such as States, Republics or Cantons, to maintain insurance or other financial security to cover their liability as operators of nuclear ships."

the operation of the nuclear plant, it must ensure the payment of claims for compensation established against the operator by providing the necessary funds if the insurance is inadequate. 284/

358. Likewise, article 10 of the 1960 Convention on Third Party Liability in the Field of Nuclear Energy requires the operator of nuclear plants to maintain insurance or provide other financial security in accordance with the Convention. 285/

284/ Article VII of the Convention reads:

"1. The operator shall be required to maintain insurance or other financial security covering his liability for nuclear damage in such amount, of such type and in such terms as the Installation State shall specify. The Installation State shall ensure the payment of claims for compensation for nuclear damage which have been established against the operator by providing the necessary funds to the extent that the yield of insurance or other financial security is inadequate to satisfy such claims but not in excess of the limit, if any, established pursuant to article V.

2. Nothing in paragraph 1 of this article shall require a Contracting Party or any of its constituent subdivisions, such as States or Republics, to maintain insurance or other financial security to cover their liability as operators.

3. The funds provided by insurance, by other financial security or by the Installation State pursuant to paragraph 1 of this article shall be exclusively available for compensation due under this Convention.

4. No insurer or other financial guarantor shall suspend or cancel the insurance or other financial security provided pursuant to paragraph 1 of this article without giving notice in writing of at least two months to the competent public authority or, in so far as such insurance or other financial security relates to the carriage of nuclear material, during the period of the carriage in question."

285/ Article 10 of the Convention reads:

"(a) To cover the liability under this Convention, the operator shall be required to have and maintain insurance or other financial security of the amount established pursuant to article 7 and of such type and terms as the competent public authority shall specify.

(b) No insurer or other financial guarantor shall suspend or cancel the insurance or other financial security provided for in paragraph (a) of this article without giving notice in writing of at least two months to the competent public authority or, in so far as such insurance or other financial security relates to the carriage of nuclear substances, during the period of the carriage in question.

(c) The sums provided as insurance, reinsurance, or other financial security may be drawn upon only for compensation for damage caused by a nuclear incident."

359. In addition to conventions dealing with nuclear materials, conventions regulating other activities with a risk of substantial injury also require guarantees for payment of compensation in case of injury. Under article 15 of the 1952 Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, the operators of aircraft registered in another contracting State are required to maintain insurance or provide other security for possible damage that they may cause on the surface. Paragraph 4 (c) of that article provides that a contracting State may accept, instead of insurance, the guarantee of the contracting State in which the aircraft is registered, provided that State undertakes to waive immunity from suit in respect of that guarantee.

360. The 1969 International Convention on Civil Liability for Oil Pollution Damage requires that the owner of a ship registered in a contracting State which carries more than 2,000 tonnes of oil as cargo maintain insurance or other financial security.

361. Article 235 of the 1982 United Nations Convention on the Law of the Sea also provides, in paragraph 3, that States shall cooperate in developing procedures for payment of adequate compensation funds.

362. Article 12 of the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment requires the Parties to the Convention, where appropriate, to ensure under internal law that operators have financial security to cover the liability under the Convention and to determine its scope, conditions and form. Such financial security may be subject to a certain limit. Under the article, the Parties, in determining which activities should be subject to the requirement of financial security, should take account of the risks of the activity.

363. Similarly, article 10 of the 1995 draft convention on NHS provides for compulsory insurance of the shipowner and shipper. Draft article 11 provides for a scheme to provide compensation, to the extent that the protection afforded in earlier articles including article 10 is inadequate or not available.

B. JUDICIAL DECISIONS AND STATE PRACTICE OUTSIDE TREATIES

364. In a few cases, a State engaged in activities entailing risks of damage to other States has unilaterally guaranteed reparation of possible damage. The United States has adopted legislation guaranteeing reparation for damage caused by certain nuclear incidents. On 6 December 1974, by Public Law 93-513, adopted in the form of a joint resolution of Congress, the United States assured compensation for damage that might be caused by nuclear incidents involving the nuclear reactor of a United States warship. 286/

286/ The relevant paras. of the Public Law 93-513 reads:

"Whereas it is vital to the national security to facilitate the ready acceptability of United States nuclear powered warships into friendly foreign ports and harbours; and

Whereas the advent of nuclear reactors has led to various efforts throughout the world to develop an appropriate legal regime for

365. Public Law 93-513 was subsequently supplemented by Executive Order 11918, of 1 June 1976, which provided for prompt, adequate and effective compensation in the case of certain nuclear incidents. 287/

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compensating those who sustain damages in the event there should be an incident involving the operation of nuclear reactors; and

Whereas the United States has been exercising leadership in developing legislative measures designed to assure prompt and equitable compensation in the event a nuclear incident should arise out of the operation of a nuclear reactor by the United States as is evident in particular by section 170 of the Atomic Energy Act of 1954, as amended; and

Whereas some form of assurance as to the prompt availability of compensation for damage in the unlikely event of a nuclear incident involving the nuclear reactor of a United States warship would, in conjunction with the unparalleled safety record that has been achieved by United States nuclear powered warships in their operation throughout the world, further the effectiveness of such warships: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that it is the policy of the United States that it will pay claims or judgements for bodily injury, death, or damage to or loss of real or personal property proven to have resulted from a nuclear incident involving the nuclear reactor of a United States warship: Provided, that the injury, death, damage, or loss was not caused by the act of an armed force engaged in combat or as a result of civil insurrection. The President may authorize, under such terms and conditions as he may direct, the payments of such claims or judgements from any contingency funds available to the Government or may certify such claims or judgements to the Congress for appropriation of the necessary funds."

Public Law 95-513, United States Statutes at Large, 1974, vol. 88, part 2, 1610-1611.

287/ The Executive Order reads:

"By virtue of the authority vested in me by the joint resolution approved 6 December, 1994 [Public Law 93-513.88 Stat. 1601.42 U.S.C.2211] and by section 301 of Title 3 of the United States Code, and as President of the United States of America, in order that prompt, adequate and effective compensation will be provided in the unlikely event of injury or damage resulting from a nuclear incident involving the nuclear reactor of a United States warship, it is hereby ordered as follows:

Section 1. (a) With respect to the administrative settlement of claims or judgements for bodily injury, death, or damage to or loss of real or personal property proven to have resulted from a nuclear incident involving the nuclear reactor of a United States warship, the Secretary of Defense is designated and empowered to authorize, in accord with

366. In an exchange of notes between the United States and Spain in connection with the Treaty of friendship and cooperation concluded between them in 1976, the United States gave the assurance that "it will endeavour, should the need arise, to seek legislative authority to settle in a similar manner claims for bodily injury, death or damage to or loss of real or personal property proven to have resulted from a nuclear incident involving any other United States nuclear component giving rise to such claims within Spanish territory." 288/

367. In other words, the United States unilaterally expanded its liability and volunteered, if necessary, to enact legislation expressing such obligation towards Spain.

368. Similarly, a statement made by the United States Department of State in connection with weather modification activities also speaks of advance agreements with potential victims' States. In connection with the 1966 hearings before the United States Senate on pending legislation concerning a programme to increase usable precipitation in the United States, the State Department made the following statement:

> "The Department of State's only concern would be in case the experimental areas selected would be close to national boundaries which might create problems with the adjoining countries of Canada and Mexico. In the event of such possibilities the Department would like to ensure

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Public Law 93-513, the payment, under such terms and conditions as he may direct, of such claims and judgements from contingency funds available to the Department of Defense.

(b) The Secretary of Defense shall, when he considers such action appropriate, certify claims or judgements described in subsection (a) and transmit to the Director of the Office of Management and Budget his recommendation with respect to appropriation by the Congress of such additional sums as may be necessary.

Section 2. The provision of section 1 shall not be deemed to replace, alter or diminish the statutory and other functions vested in the Attorney-General, or the head of any other agency, with respect to litigation against the United States and judgements and compromise settlements arising therefrom.

Section 3. The functions herein delegated shall be exercised in consultation with the Secretary of State in the case of any incident giving rise to a claim of a foreign country or national thereof, and international negotiations relating to Public Law 93-513 shall be performed by or under the authority of the Secretary of State."

Federal Register, vol. 41, No. 108, 3 June 1976, p. 22,329.

288/ Digest of United States Practice in International Law 1976 (Washington, D.C.), p. 441.

that provision is made for advance agreements with any affected countries before such experimentation took place." 289/

369. In at least one case, a State undertook to guarantee compensation for injuries that might be caused in a neighbouring State by a private company operating in its territory. Thus Canada and the United States conducted negotiations concerning a project for petroleum prospection that a private Canadian company planned to undertake in the Beaufort Sea, off the Mackenzie delta. The project aroused grave concern in the neighbouring territory of Alaska, in particular in respect of the safety measures envisaged and the funds available for compensating potential victims in the United States. As a result of negotiations, the Canadian company was required to constitute a fund that wold ensure payment of the required compensation. The Canadian Government, in turn, undertook to guarantee the payment of compensation. 290/

289/ Letter addressed by the Department of State to Senator Magnuson, Chairman of the Senate Committee on Commerce, "Weather Modification", Hearings before the Committee on Commerce, United States Senate, 89th Congress, second session, part 2, 1966, p. 321.

290/ International Canada, Toronto, vol. 7, 1976, pp. 84-85.

CHAPTER VII. ENFORCEMENT OF JUDGEMENTS

370. If the rights of injured parties are to be effectively protected, it is essential that decisions and judgements awarding compensation should be enforceable. State practice has established the principle that States must not impede or claim immunity from judicial procedures dealing with disputes arising from extraterritorial injuries resulting from activities undertaken within their jurisdiction. States have thus agreed to enforce the judgements or awards rendered by the competent organs concerning disputes arising from such injuries.

A. TREATY PRACTICE

371. Multilateral agreements generally contain provisions relating to this last step in the protection of the rights of injured parties. They provide that, once a final judgement on compensation has been rendered, it shall be enforced in the territories of the contracting parties and that parties may not invoke jurisdictional immunity. For example, the 1960 Convention on Third Party Liability in the Field of Nuclear Energy provides, in article 13, paragraphs (d) and (e), that final judgements rendered by a court competent under the Convention are enforceable in the territory of any of the contracting parties, and that, if an action for damages is brought against a contracting party as an operator liable under the Convention, such party may not invoke jurisdictional immunity. 291/

372. Similar provisions are contained in the 1952 Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface, which provides that a final judgement pronounced by a competent court shall be enforceable in the territory of any contracting State once the formalities prescribed by the laws of that State have been complied with. 292/

291/ Article 13 reads:

"...

(d) Judgements entered by the competent court under this article after trial or by default, shall, when they have become enforceable under the law applied by that court, become enforceable in the territory [illegible] of the other Contracting Parties as soon as the formalities required by the Contracting Party concerned have been complied with. The merits of the case shall not be the subject of further proceedings. The foregoing provisions shall not apply to interim judgements.

(e) If an action is brought against a Contracting Party under this Convention, such Contracting Party may not, except in respect of measures of execution, invoke any jurisdictional immunities before the court competent in accordance with this article".

292/ Article 20 of the Convention reads in part:

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4. Where any final judgment including a judgment by default, is pronounced by a court competent in conformity with this Convention, on

373. Under the Additional Convention to the CIV, the final judgements rendered by competent courts are enforceable in any other contracting State. 293/

374. Article XII of the 1963 Vienna Convention on Civil Liability for Nuclear Damage contains similar language. 294/

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which execution can be issued according to the procedural law of that court, the judgment shall be enforceable upon compliance with the formalities prescribed by the laws of the Contracting State, or of any territory, State or province thereof, ..."

293/ Article 20 of the Convention provides:

"1. Judgments entered by the competent court under the provisions of this Convention after trial, or by default, shall, when they have become enforceable under the law applied by that court, become enforceable in any of the other Contracting States as soon as the formalities required in the State concerned have been complied with. The merits of the case shall not be the subject of further proceedings.

The foregoing provisions shall not apply to interim judgments nor to awards of damages in addition to costs, against a plaintiff who fails in his action.

Settlements concluded between the parties before the competent court with a view to putting an end to a dispute, and which have been entered on the record of that court, shall have the force of a judgment of that court.

2. Security for costs shall not be required in proceedings arising out of the provisions of this Convention".

294/ Article XII reads:

"1. A final judgment entered by a court having jurisdiction under article XI shall be recognized within the territory of any other Contracting Party, except:

(a) where the judgment was obtained by fraud;

(b) where the party against whom the judgment was pronounced was not given a fair opportunity to present his case; or

(c) where the judgment is contrary to the public policy of the Contracting Party within the territory of which recognition is sought, or is not in accord with fundamental standards of justice.

2. A final judgment which is recognized shall, upon being presented for enforcement in accordance with the formalities required by the law of the Contracting Party where enforcement is sought, be enforceable as if it were a judgment of a court of that Contracting Party.

375. Under article 12 of the Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, a judgement given by a competent court, which is enforceable in the State of origin where it is not subject to ordinary forms of review, shall be recognized in the territory of any other State party. If, however, the judgement is obtained by fraud, or if the defendant was not given reasonable notice and a fair opportunity to present his case, the judgement is not enforceable. The article provides further that a judgement recognized as valid shall be enforceable in the territory of any State party once the "formalities" required by that State have been complied with, but that those formalities may neither reopen the case nor raise the question of applicable law. 295/

376. Article 13 of the same Convention provides that, if the operator is a State party, it will still be subject to the national court of the controlling State or the State in whose territory the damage has occurred, and must waive all defences based on its status as a sovereign State. 296/

377. The 1969 International Convention on Civil Liability for Oil Pollution Damage similarly provides that final judgements rendered in a contracting

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3. The merits of a claim on which the judgment has been given shall not be subject of further proceedings."

295/ Article 12 reads:

"1. Any judgment given by a court with jurisdiction in accordance with article 11, which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any State Party, except:

(a) where the judgment was obtained by fraud, or

(b) where the defendant was not given reasonable notice and a fair opportunity to present his case.

2. A judgment recognized under paragraph 1 of this article shall be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be reopened, nor a reconsideration of the applicable law".

296/ Article 13 reads:

"Where a State Party is the operator, such State shall be subject to suit in the jurisdiction set forth in article 11 and shall waive all defences based on its status as a sovereign State".

State are enforceable in any other contracting State. 297/ The Convention provides further, in paragraph 2 of article XI, that States shall waive all defences based on their status as sovereign States. 298/

378. In the 1972 Convention on International Liability for Damage caused by Space Objects, the language on enforceability of awards is different. Under article XIX, a decision of the Claims Commission shall be final and binding if the parties have so agreed; otherwise, the Commission shall render a recommendatory award, which the parties shall consider in good faith. The enforceability of awards thus depends entirely upon the agreement of the parties. 299/

379. Under article 23 of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, any decision given by a court with jurisdiction under the Convention, where it is no longer subject to ordinary forms of review, shall be recognized in any Party, unless:

297/ Article X reads:

"1. Any judgment given by a Court with jurisdiction in accordance with article IX which is enforceable in the State of origin where it is no longer subject to ordinary forms of review shall be recognized in any Contracting State except:

(a) where the judgment was obtained by fraud; or

(b) where the defendant was not given reasonable notice and a fair opportunity to present his case.

2. A judgment recognized under paragraph 1 of this article shall be enforceable in each Contracting State as soon as the formalities required in that State have been complied with. The formalities shall not permit the merits of the case to be reopened".

298/ Article XI reads:

"...

2. With respect to ships owned by a Contracting State and used for commercial purposes, each State shall be subject to suit in the jurisdictions set forth in article IX and shall waive all defences based on its status as a sovereign State".

299/ Article XIX of the Convention reads in part:

"1. The Claims Commission shall act in accordance with the provisions of article XII.

2. The decision of the Commission shall be final and binding if the parties have so agreed; otherwise the Commission shall render a final and recommendatory award, which the parties shall consider in good faith. The Commission shall state the reasons for its decision or award".

"a. such recognition is contrary to public policy in the State in which recognition is sought;

b. it was given in default of appearance and the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence;

c. the decision is irreconcilable with a decision given in a dispute between the same parties in the State in which recognition is sought;

d. the decision is irreconcilable with an earlier decision given in another State involving the same cause of action and between the same parties, provided that this latter decision fulfils the conditions necessary for its recognition in the State addressed."

380. Under paragraph 2 of article 23, a decision recognized under paragraph 1 which is enforceable in the State of origin shall be enforceable in each State Party as soon as the formalities required (which shall not permit the merits of the case to be reopened) by the laws of that Party have been completed.

381. The rules of this article are based on the European Community Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 300/ and the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988. 301/

382. As regards the relationship between the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment and other treaties dealing with the enforcement of judgements, article 24 of the Convention provides that "Whenever two or more States Parties are bound by a Treaty establishing rules of jurisdiction or providing for recognition and enforcement in a State of decisions given in another State, the provisions of that Treaty replace the corresponding provisions of [the relevant articles] of this Convention."

383. As far as the relation between the Convention and the domestic law of States Parties is concerned, article 26 of the Convention states that the Convention is without prejudice to the domestic laws of States Parties or any other agreements which they may have. As regards Parties members of the

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300/ For the text of the Convention see, Int'l L. Mat., vol. 8, 1969, p. 229.

301/ For the text of the Convention see, Official Journal of the European Communities, L 299, vol. 31, 1988, No. L 319/9.

European Economic Community, the Community rules will be the governing rules and the provisions of the Convention apply only to the extent that there is no Community rule governing a particular issue. 302/

384. In accordance with article 20 of CRTD, any judgement given by a court with jurisdiction in accordance with the Convention, which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognized in any State Party, except:

> "(a) where the judgment was obtained by fraud;
>
> (b) where the defendant was not given reasonable notice and a fair opportunity to present his case;
>
> (c) where the judgment is irreconcilable with an earlier judgment given in the State where the recognition is sought, or given in another State Party with jurisdiction in accordance with article 19 and already recognized in the State where the recognition is sought, involving the same cause of action and between the same parties."

385. Paragraph 2 of the article provides that any judgement recognized under paragraph 1 shall be enforceable in each State Party as soon as the formalities required (which shall not reopen the merits of the case) in that State have been complied with.

386. Article 12 of the draft protocol to the Basel Convention provides that any judgement of a competent court shall, if it is enforceable in the State of origin, be recognized in any Contracting Party and shall be enforceable without review of the merits of the case.

B. JUDICIAL DECISIONS AND STATE PRACTICE OUTSIDE TREATIES

387. The issue of enforcement of awards and judgements by arbitral tribunals and courts has not been raised in judicial decisions. In their official correspondence, States have usually arrived at compromises and in most cases have complied with the solutions agreed upon. The content of such correspondence has been examined in the preceding chapters.

302/ Article 26 of the Convention reads:

> "1. Nothing in this Convention shall be construed as limiting or derogating from any of the rights of the persons who have suffered the damage or as limiting the provisions concerning the protection or reinstatement of the environment which may be provided under the laws of any Party or under any other agreement to which it is a Party.
>
> 2. In their mutual relations, Parties which are members of the European Economic Community shall apply Community rules and shall therefore not apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned."